In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

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No. 74-309

TREASURE VALLEY POTATO BARGAINING ASSOCIATION, *et al.*,
Petitioners,

vs.

ORE-IDA FOODS, INC. and J. R. SIMPLOT CO.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI
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Petitioners Treasure Valley Potato Bargaining Association, *et al.* (hereinafter "Treasure Valley") pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit (Court of Appeals Number 71-2742) entered in the above-entitled case on April 11, 1974. A petition for rehearing and suggestion for rehearing in banc was denied by the Court of Appeals on June 24, 1974.

STATUTES INVOLVED

(1) Section 1 of the Sherman Act (15 U.S.C. §1) provides, in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

(2) Section 2 of the Sherman Act (15 U.S.C. §2) provides:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

(3) Rule 52 of the Federal Rules of Civil Procedure provides, in pertinent part:

> **Rule 52. Findings by the Court**
>
> **(a) Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge

of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

STATEMENT OF THE CASE

(A) THE NATURE OF THE CASE

This is a private treble damage action under Section 4 of the Clayton Act (15 U.S.C. §15). Plaintiffs are individual potato growers who bring this action on their own behalf and as representatives of a class comprised of all potato growers who are members of the Treasure Valley Potato Growers Bargaining Association (hereinafter "Treasure Valley") and the Malheur Potato Bargaining Association (hereinafter "Malheur").

The defendants-appellees are Ore-Ida Foods, Inc. and J. R. Simplot Co. (hereinafter "Ore-Ida" and "Simplot") who are processors of numerous food items including many potato products, such as frozen potatoes, which defendants sell and distribute throughout the United States for resale. [R. 3-4.][1] The potatoes processed by defendants are purchased from growers including, among others, the plaintiffs in the present case. [R. 4.]

Treasure Valley and Malheur are agricultural cooperatives, each composed of several hundred potato grower members. These associations are in the business of repre-

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[1] "R" refers to the Record on Appeal. "T" refers to the Reporter's Transcript.

senting their individual members on a collective basis in negotiations with potato processors, including the defendants, in order to secure for their members the most advantageous price for potatoes. [R. 2-3, 6745-6746.]

The plaintiffs allege that defendants Ore-Ida and Simplot combined and conspired to unreasonably restrain and monopolize interstate trade and commerce in frozen potato products in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2). Moreover, plaintiffs allege that defendants have unilaterally attempted to monopolize and have monopolized such trade and commerce in violation of Section 2 of the Sherman Act (15 U.S.C. § 2). [R. 5-6, 6748-6749.] These violations were allegedly accomplished by defendants through such means as (a) their fixing of uniform, non-competitive prices at which they would purchase potatoes from plaintiffs; (b) their reprisal tactics against officers of the plaintiff bargaining associations by *inter alia* refusing to purchase potatoes from such officers, or reducing the amount of potatoes purchased from them; (c) discriminatory treatment of growers who refused to purchase seed and/or fertilizer from defendants (in violation of Section 3 of the Clayton Act, 15 U.S.C. § 14); (d) defendants' allocation of growers and customers among themselves; (e) defendants' fixing of artificially high prices on processed frozen potatoes; and (f) defendants' acquisition and cultivation of acreage in order to put independent potato growers out of business and enable defendants to purchase such growers' land and/or potatoes at depressed prices. [R. 6, 6749.]

Defendants Ore-Ida and Simplot filed a counterclaim alleging antitrust violations against the plaintiff bargain-

ing associations and their respective members. [R. 80, 96, 5633, 5969, 6225, 6236.]

(B) THE COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

The complaint in this case was filed by plaintiffs on December 14, 1966 [R. 1]; the second amended complaint was filed on October 9, 1969. [R. 6744.] Defendants' answers and counterclaims were timely filed thereafter. [R. 80, 96, 6225, 6236.] Following more than four years of extensive pretrial proceedings and discovery, the case went to trial on March 9, 1971 in the United States District Court for the District of Idaho before the Honorable Ray McNichols. [R. 8662-8663.] Each of the parties waived trial by jury. [R. 8664.]

On August 3, 1970 the District Court granted the defendants' motion for summary judgment as to those portions and paragraphs of the Second Amended Complaint which alleged: that the defendants in violation of §3 of the Clayton Act refused to purchase potatoes unless the growers agreed to purchase seed and/or fertilizer from the defendants or unreasonably discriminated against growers who did not make such purchases; that the defendants allegedly fixed non-competitive, arbitrary and artificially high prices on processed frozen potatoes; and that the defendants allegedly entered into or expanded their potato-growing activities by securing acreage or additional acreage and placing said acreage under cultivation in order to put independent potato growers out of business, or to enable defendants to purchase

growers' land or potatoes at depressed prices. The defendants' motion was granted on the stipulation of the plaintiffs that no pecuniary damage was being or would be sought under the allegations involved, and on the Court's order that that ruling would not affect the admissibility of evidence during trial. [R. 8663.]

On June 15, 1971 the District Court filed its Findings of Fact and Conclusions of Law [R. 8661-8684] together with its Judgment based thereon. [R. 8685-8691.] The Court ruled against plaintiffs as to all of their antitrust claims and against defendants as to their counterclaims. [R. 8688-8691.] The Court of Appeals affirmed the District Court ruling that neither plaintiffs nor defendants had violated the antitrust laws.

(C) STATEMENT OF FACTS

The opinion of the Ninth Circuit below summarizes the facts adduced in the voluminous record. A few excerpts from the Court of Appeals' opinion (497 F.2d at pp. 206-208) will suffice for our purposes:

> During 1963 to 1966, Ore-Ida and Simplot purchased raw potatoes both by preseason contract and by purchase on the open market. They made these potato procurements from growers in Idaho and Oregon and also from growers in other states. Although they bought large amounts of potatoes from members of Treasure Valley and Malheur, they also purchased from growers who were not members.
>
> This litigation arises from the activities leading up to the formation of preseason contracts between the defendants and the growers in the plaintiff class.

Officers and members of Treasure Valley and Malheur met with each other often during 1963 to 1966 to discuss the prices and the terms of sale that each association, during its separate negotiations with the potato processors, would seek to obtain for its members in preseason contracts. The two associations agreed to seek similar terms.

Generally, Malheur would be the first to bargain with Ore-Ida. After those two had reached an agreement, Treasure Valley would negotiate with Ore-Ida and seek to obtain the same terms for its members. In a similar fashion, Treasure Valley would be the first to bargain with Simplot, and Malheur would follow, seeking to obtain the same terms for its members selling to Simplot.

There was normally true bargaining over the first preseason contract performed, whether it was between Malheur and Ore-Ida, or Treasure Valley and Simplot. Once the terms of that first contract were established, both processors would routinely refuse to give better terms in subsequent contracts that year, and both associations would usually refuse to accept worse terms.

The negotiations over preseason contracts were widely publicized in the agricultural community of Idaho and Oregon. Newspapers and radio frequently reported the prices and other terms being offered. The growers talked freely with each other about the status of the negotiations, and exchanged information with employees of the processors. Without doubt, the parties were "bargaining in sunshine."

* * *

The basic factual issue under this claim is why the preseason contracts negotiated by the bargaining associations with Simplot, on one hand, and Ore-Ida,

> on the other, contain similar price terms. The plaintiffs contend that Simplot and Ore-Ida conspired to maintain similar terms. The court, however, found that the similarities in preseason contracts stemmed from the concerted bargaining activity of the two associations and from natural market forces. . . .
>
> The plaintiffs adduce a variety of circumstantial evidence tending to prove the alleged conspiracy. Foremost is the similarity in contracts. In addition, the plaintiffs present documentary evidence—memoranda, journal entries, meeting minutes, and so forth—which show that the defendants communicated with each other, and which tend to show that they discussed prices on preseason contracts.

In fact the prices offered by Ore-Ida and Simplot were not merely "similar", but were consistently *identical* to the mill. Moreover, this price identity occurred after defendants openly discussed and exchanged price information.

Very important are findings of fact numbers 26, 27, 28 and 29 of the District Court. In these findings, the Court recognized the identity of terms which were contained in defendants' pre-season contracts and erroneously found that from the testimony, the documentary evidence and the inferences to be drawn therefrom:

> ". . . that none of the officers or employees of either defendant *ever discussed* or agreed upon the price that either or both would pay for raw potatoes." (Emphasis added)

The record was replete with evidence of defendants' employees discussing prices with one another. Even the Court of Appeals was moved to observe that this finding

by the District Court was erroneous. 497 F.2d at page 208, footnote 4.

REASONS FOR GRANTING THE WRIT

The District Court below made a clearly erroneous finding that representatives of the defendants Ore-Ida and Simplot, dominant competitors in the potato processing market did not even discuss prices with each other in relation to their dealings with plaintiffs, who were potato growers. On appeal, the Ninth Circuit ruled that the District Court's finding that defendants did not discuss prices, nor was there evidence from which price discussions could be inferred, was wrong. (497 F.2d at page 208, footnote 4). Nonetheless, the Court of Appeals held that even if the trial court had been clearly erroneous with respect to whether or not the defendants discussed prices, the error did not control the outcome of the case.

In this regard, the ruling by the Court of Appeals is inconsistent with decisions by this Court in *Continental Ore v. Union Carbide and Carbon Corp.*, 370 U.S. 690, 962 (1962) and *United States v. Container Corporation of America*, 393 U.S. 333 (1969). See also the Ninth Circuit decisions in *Esco Corporation v. United States*, 340 F.2d 1000 (9th Cir. 1965); *C-O-Two Fire Equipment Co. v. United States*, 197 F.2d 489 (9th Cir. 1952); *Flintkote Co. v. Lysford*, 246 F.2d 368 (9th Cir. 1957) and *Estate of LeBaron v. Rohm & Haas Co.*, 441 F.2d 575 (9th Cir. 1971).

I. THE RULING BELOW UNDERMINES THIS COURT'S DECISIONS RELATING TO PROOF OF CONSPIRACY IN ANTITRUST CASES

This Court has consistently recognized the difficulty faced by antitrust plaintiffs in attempting to prove the existence of a conspiracy. Numerous cases decided by this Court have mandated lower courts to be more liberal in allowing plaintiffs to utilize circumstantial evidence. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939); *Poller v. Columbia Broadcasting System*, 368 U.S. 464 (1962); *United States v. General Motors Corp.*, 384 U.S. 127 (1966); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1972)

The Ninth Circuit itself has ruled that evidence of meetings between competitors which provided the "*opportunity* . . . to discuss . . . prices" is cogent evidence in a price-fixing case. *C-O-Two Fire Equipment Co. v. United States*, 197 F.2d 489, 493 (9th Cir. 1952). Also see *Esco Corporation v. United States*, 340 F.2d 1000 (9th Cir. 1965). If *circumstantial* evidence that competitors may have discussed prices is cogent evidence, then *a fortiori, direct* evidence of price discussions between competitors accused of price-fixing is strong, if not the very best, evidence in a price-fixing case.

The significance of the direct evidence of price discussions between the defendants accused of price-fixing cannot be denied. Very few price-fixing cases in the history of the Sherman Act have had direct evidence of price discussions between and among accused price-fixers. In *American Tobacco Co. v. United States*, 328 U.S. 781

(1946) the Court recognized the difficulty in proving a price-fixing conspiracy and held that even:

> "Acts done to give effect to the conspiracy may be in themselves *wholly innocent* acts. Yet, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibitions." 328 U.S. at 809.

If "wholly innocent" acts may help in proving price-fixing, surely price discussions also help. There is *nothing* innocent about competitors discussing prices—*especially* where, according to the lower courts in our present case, the parties were "bargaining in sunshine." (497 F.2d at p. 207.) The petitioners submit that this Court should again unequivocally condemn price discussions between competitors. There is simply no justification for such conduct. Where is the redeeming social or economic value in such a practice? Price discussions serve no purpose other than unhealthy comraderi between and among so-called competitors. Surely competitors understand the significance of discussing prices, otherwise they would not do it.

> "Nor are we so naive as to believe that a formal signed-and-sealed contract or written resolution would conceivably be adopted at a meeting of price-fixing conspirators in this day and age. In fact, the typical price-fixing agreement is usually accomplished in a contrary manner." *Esco Corp. v. United States*, 340 F.2d at 1006.

To hold, as the Courts below did, that direct evidence of price discussions between competitors may be disregarded (or excluded) from a price-fixing case without

affecting the case is a grave and substantial threat to the prosecution of antitrust cases, as well as an invitation to competitors in other industries to stabilize prices by talking about them. This Court should grant review and mandate an end to such anticompetitive practices.

II. THE APPELLATE COURT SHOULD NOT MAKE INDEPENDENT FINDINGS OF FACT

Can an appellate court, knowing that the trier of fact did *not* make its findings "from *all* the evidence in the case, and from the inferences that reasonably flow therefrom," affirm such findings? Manifestly, the trier of fact in this case did *not* make its findings from "all the evidence," as it was required to do. *Continental Ore v. Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962). The evidence which was totally disregarded in this case, namely, direct evidence of price discussions, was the most important evidence the plaintiffs had. Since the trier of fact was clearly wrong in its finding that the defendants never even discussed prices at all, then the trier of fact was equally wrong in its statement that it considered "*all* the evidence"—which it patently did not. Accordingly, the Court of Appeals was without the power to consider the disregarded evidence and then to make a finding *for* the trier of fact. The affirmance by the Court of Appeals was nothing less than a compartmentalization of the plaintiff's case and usurpation of the role of the trier of fact. *Continental Ore v. Union Carbide and Carbon Corp., supra.* The most that the appellate court should have done was to remand the case to the trier of fact for findings

which include consideration of all the relevant evidence, particularly the direct evidence of price discussions among competitors.

The Court of Appeals should not have taken the position that if the trier of fact had considered all the evidence the trier of fact would have found that the plaintiffs were not injured. *Continental Ore v. Union Carbide and Carbon Corp., supra; Perkins v. Standard Oil of California*, 395 U.S. 642 (1969). It is respectfully submitted that the Ninth Circuit's decision below falls into the same error committed by the lower Court in *Continental Ore v. Union Carbide and Carbon Corp.*, 289 F.2d 86 (9th Cir. 1961). In that case, the jury found in favor of the defendants. The plaintiffs appealed, asserting error as to the instructions and exclusion of evidence. The Ninth Circuit ruled that the trial court should have directed a verdict. In doing so, the Court stated:

> "In reaching our decision we shall look not only at all the evidence admitted by the trial judge, *but also at all the evidence offered by plaintiffs but excluded below.*" 289 F.2d at 90

Thus, the Court of Appeals held in that case, as it did here, that even if the excluded (disregarded) evidence had been considered, the trier of fact would have found no causation. The Supreme Court reversed. So also in our case, the Court of Appeals should not have substituted itself for the trier of fact by finding that, assuming *arguendo* the defendants had an agreement to exchange the prices found to have been exchanged, it would "have had no substantial causal effect on preseason contracts." (497 F.2d at page 209.) In addition, the Court should not have

assumed that the trier of fact would have ruled the same as it did if it had considered the direct evidence of price discussions since the lower court also found that

> "both processors would *routinely refuse* to give better terms in subsequent contracts that year. . ." 497 F.2d at page 207

It is eminently reasonable, as this Court stated in *Container*, that

> "Knowledge of a competitor's price usually meant matching that price." 393 U.S. at 336, 337.

In our case, as distinguished from *Container*, it *always* or *routinely* meant just that.

III. THE DECISIONS BELOW UNDERMINE THIS COURT'S RULING IN UNITED STATES v. CONTAINER CORP. OF AMERICA, 393 U.S. 333 (1969)

The Ninth Circuit Court of Appeals, by its ruling below, continues to ignore the principles enunciated by this Court in *United States v. Container Corp. of America, supra.* Compare *Gray v. Shell Oil Co.*, 469 F.2d 742 (9th Cir. 1972), *cert. denied* 412 U.S. 943 (1973). The Ninth Circuit seems not to be satisfied with evidence that competitors routinely exchanged price information resulting in exact price identity. Instead, it appears to require some type of direct evidence of a specific or underlying agreement to exchange prices between those competitors.

However, as a matter of law, an agreement to exchange prices is inherent in the fact of the exchange. *United States v. Container Corp. of America, supra.* In *Container*, this Court reversed the trial court (273 F.Supp.

18) which found, as fact, in the face of direct evidence of price exchanges, that the defendants did not agree to exchange the prices found to have been exchanged. This Court rightly found that the *mere fact of the exchange* established the combination and conspiracy ingredient under the Sherman Act, 393 U.S. at 335, and that the *mere fact of the exchange* limited and reduced price competition between and among the parties exchanging the information. 393 U.S. at 336, 337. The rulings below, in our present case thus undermine the important antitrust principle set forth in the *Container* decision.

The plain language of *Container* states that an exchange of prices among competitors which *seems* to have the effect of keeping prices within a fairly narrow ambit is a violation of the Sherman Act.

The case at bar is significantly stronger than *Container*.

Container	*Present Case*
1. exchange of prices	1. exchange of prices
2. only when prices *not available* from another source. 393 U.S. at 335	2. prices always available from "bargaining in sunshine"
3. fragmentary prices requiring manuals to compute actual prices. 393 U.S. at 336	3. actual prices
4. the exchange "seemed to have the effect of keeping prices within a fairly narrow ambit." 393 U.S. at 336	4. identical prices because "both processors would *routinely refuse*" to pay more
5. "Knowledge of a competitor's price *usually* meant matching that price." 393 U.S. at 336, 337	5. "*Routinely refuse*" to pay more

The Court of Appeals distinguished our present case from *Container* on the grounds that *Container* (1) involved an *agreement* to exchange the prices found to be ex-

changed; (2) assuming an agreement to exchange the prices, such an exchange has no effect on the prices paid; and (3) it is not clear that *Container* applied a *per se* rule.

A. Container did *not* involve an underlying agreement to exchange the prices. The Court of Appeals' ruling herein, to the extent that it requires an agreement to exchange prices found to have been exchanged, resurrects the trial court's decision in *Container* (273 F.Supp. 18) which the Supreme Court reversed. The lower court specifically found as fact that there was no agreement to exchange prices. 273 F.Supp. at 58, 59. Apparently, this finding was based upon the facts that the defendants "usually" exchanged prices and, then, only when it was not available from another source. 273 F.Supp. at 59. In reversing, this Court noted that all that was present was an exchange of prices.

> "That concerted action is *of course* sufficient to establish the combination or conspiracy, the initial ingredient of a violation of §1 of the Sherman Act." 393 U.S. at 334.

This ruling rebutted the lower court's finding that the *exchange* in *Container* "is the very antithesis of an agreement."

B. This Court held in *Container*, contrary to the lower court's finding of fact, that the exchange was neither done with the purpose nor had the effect of stabilizing prices, that the exchange of prices does as a matter of law stabilize prices.

The lower court in *Container*, like the Ninth Circuit below, held that even if there were an agreement to exchange prices, that such an agreement did not have the

purpose or effect of stabilizing prices. 273 F.Supp. 59-61. The lower court held that the plaintiff failed to present any evidence

> "In any way indicating, that prices charged by any one or more of the defendants was stabilized or harmonized by the exchange of price information, or indicated any uniformity or parallelism of prices between or among two or more of the defendants." 273 F.Supp. at 61

In reversing, the Supreme Court recognized what was obvious, namely: the exchange of prices surely reduced or eliminated price competition between the parties exchanging the prices.

> "The result of this reciprocal exchange of prices was to stabilize prices . . . Knowledge of a competitor's price usually meant matching that price . . . The inferences are irresistible that the exchange of price information has an anticompetitive effect . . . chilling the vigor of price competition . . .
>
> . . .
>
> "Price is too critical and too sensitive a control to allow it to be used, even in an informal manner, to restrain competition." 393 U.S. at 336-338.

C. The *Container* decision establishes the principle that the exchange of price information by competitors that leads to price stablization is, *per se*, a Sherman Act violation. Once again, this Ninth Circuit's decision below echoes the erroneous ruling by the trial court in *Container*. The lower court in *Container* said:

> ". . . the Court is led to the inescapable conclusion that no court has yet held communications of price

> information similar to those here at issue to be a violation of the Sherman Act." 273 F.Supp. at 67

In reversing, the Supreme Court first held that the exchange surely limited price competition between the parties exchanging, and then held such limitation, interfering with the market, was *per se* unlawful:

> "The limitation or reduction of price competition brings the case within the ban, for as we held in *United States v. Socony-Vacuum*, supra, interference with the setting of price by free market forces is unlawful per se. . . The exchange of price data tends toward price uniformity. . . Stabilizing prices, as well as raising them is within the ban of Section 1 of the Sherman Act. As we said in *United States v. Socony-Vacuum*. . . 'in terms of market operations stabilization is but one form of manipulation.'" 393 U.S. at 337.

But even assuming, *arguendo*, that *Container* does not outrightly condemn price exchanges between competitors, it still could *never* be said that price exchanges between competitors is the kind of conduct which "merely regulates and perhaps thereby promotes competition." *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918). Rather, it is the kind of conduct which "may suppress or even destroy competition." *Chicago Board of Trade, supra.* And, the record in our present case shows that there was *absolutely no attempt* to justify the price discussions. On such a naked record, and even assuming *Container* not to be a *per se* ruling, the Court of Appeals should have, at the very least, given some consideration to the decision by the Supreme Court, rather than dismissing *Container*

as simply a case which "does not control." (497 F.2d at p. 209.)

IV. THE LOWER COURT'S FINDINGS AND RULINGS THAT DEFENDANTS DID NOT ATTEMPT TO MONOPOLIZE AND DID NOT MONOPOLIZE TRADE AND COMMERCE IN POTATOES BY ATTEMPTING TO EXCLUDE COMPETITORS AND BY ATTEMPTING TO DESTROY THE COLLECTIVE BARGAINING ASSOCIATIONS IN VIOLATION OF SECTION 2 OF THE SHERMAN ACT WAS CLEARLY ERRONEOUS AND, IF LEFT STANDING, WOULD UNDERMINE THE FORCE AND POLICY OF SECTION 2

As set forth above, Rule 52 of the Federal Rules of Civil Procedure and the cases construing it require an appellate court to overrule clearly erroneous findings of a district court in an antitrust case as in any other civil action. *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948); *Associated Press v. Taft Ingalls Corp.*, 340 F.2d 753 (6th Cir. 1965); *Homelite v. Trywalk Realty Co.*, 272 F.2d 688 (4th Cir. 1959); *Elyria-Lorain Broadcasting Co. v. Lorain Journal Co.*, 298 F.2d 356 (6th Cir. 1961).

The evidence introduced by plaintiffs showed that for processed potatoes the outlet in the geographic area in which the growers operated was solely to the defendants, Simplot and Ore-Ida. The trial court, however, stated:

> ". . . At all relevant times raw potatoes were sold to resellers and consumers throughout the United States and to potato processors in Idaho and Oregon, such Ore-Ida and Simplot and their various competitors. Such sales outlets were available during the relevant time period to potato growers in Idaho and Oregon, including the plaintiffs and class members." (Appendix A, Finding No. 8).

The court, however, went on to find that in the particular geographical area involved in this case, as opposed to other areas of the United States in which potatoes are grown and sold, potatoes are sold and marketed under pre-season contracts. (Finding No. 9). This is supported by testimony of Mr. Jaques of Simplot which showed that the pre-season contracts accounted for as much as 80% of the potatoes acquired by defendants during any given year. The pre-season contract was, for all practical purposes, the only means by which the plaintiff growers could be assured of a market for their harvested potatoes. The court recognized this in Finding No. 11 where it stated:

> ". . . For the grower, the pre-season contract minimizes business risks by providing an assured market for his potatoes at harvest on the negotiated terms as opposed to the uncertainty of open market price which may prevail at the time of harvest and which prices are subject to fluctuation due to many factors. Pre-season contracts for delivery at harvest eliminate the possible need for the grower to store the crop to await a more favorable market price with the cost and hazards, such as shrinkage, spoilage and other loss, attendant to storage. Additionally, a pre-season contract may enable the grower to obtain a loan to finance his operations or to provide for expansion and it also provides the grower with assistance from the processor's field department on cultural practices, diseases and pest control, and other aspects of the growing and harvesting of the crop."

Against the backdrop of these findings, the trial court's statement that during the period of dispute plaintiffs had other available sales outlets (Finding No. 8.) is not only inconsistent but also fails to recognize the market reali-

ties affecting this particular geographic area. Since the plaintiff growers were so heavily dependent upon the pre-season contract device, defendants were in fact the only possible market available. The tremendous risks which would be incurred by resort to so-called "spot sales" effectively eliminated that procedure of marketing as a viable alternative.

These logically inconsistent and self-contradictory findings pale in view of further evidence which showed the dominant bargaining position occupied by defendants. Together they represented nearly 50% of the frozen potato market in the United States and processed substantially all of the raw potatoes grown in the area relevant to the case. This enviable market position was enhanced by the fact that defendants also provided the seed for planting and the bins for storage of plaintiff's potatoes. [R. 8667]. Contrary to the overwhelming weight of such evidence, however, the trial court failed even to consider the vastly superior economic strength and bargaining power of defendants Ore-Ida and Simplot *vis-a-vis* the plaintiff growers.

Based on such erroneous findings, the trial court went on to state:

> "With respect to the plaintiff's charge that defendants combined and conspired to monopolize interstate trade and commerce in raw potatoes or in frozen potato products, or attempted to monopolize such trade or commerce, the Court further finds that each of the defendants acted independently of the other with respect to all aspects of the respective businesses, including the procurement of raw potatoes and the processing, distribution and marketing of the frozen

finished product. Neither defendant possessed monopoly power in any relevant market or geographic area. The Court further finds that defendants did not by any agreement, understanding, combination, conspiracy, or otherwise, acquire or maintain power in any relevant market or geographic area to fix, stabilize or control raw potato or frozen potato product prices or to remove, exclude or foreclose competitors from such competition; and further that defendants did not either individually or collectively have the intention, nor did either attempt, to achieve, exercise or maintain any such power (Finding No. 33.)

Besides having its foundation in the erroneous assumption that defendants did not enjoy market dominance or indeed exclusivity, this finding ignores the numerous documents and other evidence which demonstrated beyond question that defendants not only acted in concert to enhance their market dominance but also proceeded independently to achieve even greater power with respect to the plaintiff growers.

Further evidence demonstrated that defendants continually attempted to expand their own growing activities by securing their own farm acreage and increasing cultivation of that acreage. This was compounded by defendants' attempts to force plaintiffs into selling their land to them at extremely depressed prices through coercion and leverage of their superior bargaining position with respect to the pre-season contracts. Thus, defendants actually became competitors with the growers, while at the same time retaining enormous monopoly power over them. This type of conduct has been condemned in *Industrial*

Building Materials, Inc. v. Interchemical Corp., 437 F.2d 1336 (9th Cir. 1970).

From the evidence, the only proper conclusions would have been those suggested by plaintiffs in their Proposed Findings of Fact and Conclusions of Law, namely that in the relevant marketing area, the two defendants were, for all substantial purposes, the sole processors of the raw potatoes of the plaintiffs and class members and constituted the principal, if not only, market for the plaintiffs and class members. Likewise, the court should properly have found, that during the relevant period of time, each of the defendants had its own potato growing farm or was in the process of purchasing land for its own potato farm which competed and would compete directly with plaintiffs. The devastating effect of the court's erroneous findings upon plaintiffs' theory of liability compels setting those findings aside.

In the landmark case of *Standard Oil Company of New Jersey v. United States*, 221 U.S. 1 (1910) Justice White pointed out that the scope of both Section 1 and Section 2 of the Sherman Act are as broad as the evils which they were enacted to prevent, and that together they accordingly reached all restrictions of trade or eliminations of competition, whether conspiratorially or unilaterally rooted, which at least in the long run produced or were likely to produce injury to the general economy.

In dealing with Section 2 of the Sherman Act, proof of monopolization itself is not necessary where it can be established that defendant employed methods, means and practices which would, *if successful*, accomplish monopoli-

zation or create a dangerous probability of it. *American Tobacco v. United States*, 328 U.S. 781 (1946). Among the various practices employed by defendants herein, several have been held illegal attempts to monopolize. For example, defendants' boycott of the growers' association officers (*Lorain Journal v. United States*, 342 U.S. 143 (1941), *Klor's v. Broadway-Hale*, 359 U.S. 207 (1959)), and defendants' discriminatory prices with regard to association members (*Union Leader Corp. v. Newspapers of New England, Inc.*, 180 F.Supp. 125 (D. Mass. 1959)). The prohibitions of Section 2 of the Sherman Act have been extended to buyers occupying a position of monopoly power as well as sellers who possess monopoly power. *United States v. Griffith*, 334 U.S. 100 (1948). And Sherman Act, Section 2 has also been held to prohibit the same basic conspiracies which are outlawed by Section 1—thus cross-referencing the provisions contained in both sections. *American Tobacco v. United States, supra.*

Accordingly, the evidence of defendants' conspiracy as outlined in previous portions of this petition, which alone should have compelled a finding against defendants, when coupled with the specific acts above mentioned, clearly constitute the type of activity contemplated as violative of Section 2 of the Sherman Act.

The most pertinent case decided under Section 2 of the Sherman Act with respect to the evidence in our present case is *Maudeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948), after remand and trial *American Crystal Sugar Co. v. Maudeville Farms, Inc.*, 195 F.2d 622 (9th Cir. 1952). *Maude-*

ville, except for the fact that that case concerned sugar beets rather than potatoes and three refiners rather than two processors and Northern California rather than Northeast Oregon and Southwest Idaho, is an identical factual and legal analysis of the present lawsuit.

In outlining the market impact in *Mandeville*, this Court stated:

> "Nor is the amount of the nation's sugar industry which the California refiners control relevant, so long as control is exercised effectively in the area concerned." 334 U.S. 219, at 236.

The description of the industry echoes the factual situation here. The Court stated that the relationship existing even without price-fixing, contains all of the elements of monopoly:

> "*Even without the uniform price provision and with full competition among the three refiners, their position is a dominating one.* The growers' only competitive outlet is the one which exists when the refiners compete among themselves. There is no other market. The farmers' only alternative to dealing with one of the three refiners is to stop growing beets. They can neither plant nor sell except at the refiners' pleasure and on their terms. The refiners thus effectively control the quantity of beets grown, harvested and marketed, and consequently of sugar sold from the area in interstate commerce, even when they compete with each other. They dominate the entire industry. And their dominant position, together with the obstacles created by the necessity for large capital investment and the time required to make it productive, makes outlet through new competition practically impossible . . . it is absolutely so for any

> single growing season. *A tighter or more all-inclusive monopolistic position hardly can be conceived.* "When therefore the refiners cease entirely to compete with each other in all stages of the industry prior to marketing the sugar, the last vestige of local competition is removed and with it the only competitive opportunity for the grower to market his product." 334 U.S. 219, at 240. (Emphasis added.)
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> * * *
>
> "In sum, the restraint and its monopolistic effects were reflected throughout each stage of the industry, permeating its entire structure. This was the necessary and inevitable effect of the agreement among the refiners to pay uniform prices for beets, in the circumstances of this case. Those monopolistic effects not only deprived the beet growers of any competitive opportunity for disposing of their crops by the immediate operation of the uniform price provision; they also tended to increase control over the quantity of sugar sold interstate; and finally by the tie-in provision they interlaced those interstate effects with the price paid for the beets." 334 U.S. 219, at 242.

Rather than viewing the evidence as a whole, and the activities of defendants as an integrated attempt to secure and maintain an all-inclusive monopolistic position with regard to the potato market in the relevant geographical area, the trial court chose instead to adopt such an extremely restrictive approach as to utterly disregard the policies contained in the antitrust laws as expressed in the cases discussed above. Inasmuch as the District Court and Court of Appeals below placed an unduly restrictive interpretation upon the facts brought out at trial, the findings that defendants' activities were not violative of Section 2

of the Sherman Act are clearly erroneous. As such, those erroneous findings must be set aside. *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948); *Associated Press v. Taft-Ingalls Corp.*, 340 F.2d 753 (6th Cir. 1965); *Elyria Lorain Broadcasting Co. v. Lorain Journal Co.*, 298 F.2d 356 (6th Cir. 1961).

CONCLUSION

For the reasons stated above, this Honorable Court should grant Treasure Valley's petition for writ of certiorari and review the rulings of the courts below.

Dated, San Francisco, California,
September 12, 1974.

JOSEPH L. ALIOTO,
PETER J. DONNICI,
JOSEPH M. ALIOTO,

LAW OFFICES OF JOSEPH ALIOTO,
Of Counsel.

HOWARD D. HUMPHREY,
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COSHO, HUMPHREY & SOUTHCOMB,
Of Counsel.

(Appendices Follow)

Appendix A

In the United States District Court
for the District of Idaho

Civil No. 1-66-108

Treasure Valley Potato Bargaining Association; Robert S. Skyles, Allen Noble and Burke Neeley, dba White Sage Farms, a partnership; James Klahr; Klahr & Klahr, Inc., a corporation; M. O. Clements; M. L. Clements; Dry Lake Farms, Inc., a corporation; Richard Stiehl; Hans Gotsch; Henry Kondo and Oscar Kondo, dba Kondo Brothers, a partnership; Kondo Farms, Inc., a corporation; Kondo Brothers, Inc., a corporation; Glenn Allen and David Allen, dba Glenn & David Allen, a partnership; R. E. Morris; R. L. Stimpson, Elsen Yorgason and Bob Hogg, dba Western Idaho Farms, a partnership; Dwayne Skogsberg, Glenn Skogsberg and Hazel Skogsberg, dba Ed Skogsberg & Sons, a partnership; Sky Ranch, Inc., a corporation; Orville Hartman; James Sutton; Hugh Sutton; Donald Brandt; John Brandt; H. E. Blanksma; Broken Arrow Farms, Inc., a corporation; Malheur Potato Bargaining Association; George Sadamori, Roy Sadamori and Theodore Sadamori, dba Sadamori Brothers, a partnership; Masa Nishihara; Sam Uchida and Sho Uchida, dba Uchida Brothers, a partnership; Abe Saito, Paul Saito and Joe Saito, dba Saito Brothers, a partnership; Saito Brothers, Inc., a corporation; and T. Tod Morinaka,

Plaintiffs and Counterdefendants,

vs.

Ore-Ida Foods, Inc., and J. R. Simplot Company,

Defendants and Counterclaimants.

[June 15, 1971]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for non-jury trial on March 9, 1971 in the above Court, before the Honorable Ray McNichols. The above named plain-

tiffs and counterdefendants, on their own behalf and as representative parties for all the class members described below, were represented in this case by Maxwell M. Blecher and Joseph M. Alioto of the law office of Joseph L. Alioto, and Howard D. Humphrey of the law firm of Cosho, Humphrey & Southcombe, with the exception that Farm Development Corporation, a class member, in its capacity as a counterdefendant only, was represented by Melvin R. Goldman of the firm of Morrison, Foerster, Holloway, Clinton & Clark and William F. Ringert of the firm of Anderson, Kaufman, Anderson & Ringert. Defendant and counterclaimant Ore-Ida Foods, Inc. ("Ore-Ida") was represented by William Simon and Donald J. Gavin of the firm of Howrey, Simon, Baker & Murchison and by Eugene C. Thomas and Ronald B. Rock of the firm of Moffatt, Thomas, Barrett & Blanton. Defendant and counterclaimant J. R. Simplot Company ("Simplot") was represented by Carl J. Schuck and George Christensen of the firm of Overton, Lyman & Prince and by Jess B. Hawley, Jr. of the firm of Hawley, Troxell, Emmis & Hawley.

By order filed herein October 14, 1969, the Court granted defendants' joint motion for summary judgment, based on incapacity to sue, against plaintiffs Treasure Valley Potato Bargaining Association ("Treasure Valley") and Malheur Potato Bargaining Association ("Malheur") and ordered that as to said plaintiffs the Second Amended Complaint was dismissed and that said plaintiffs may take nothing thereby.

By order filed August 3, 1970 the Court granted the defendants' motion for summary judgment as to the fol-

lowing charging paragraphs of the Second Amended Complaint: Paragraph 13(c), alleging that the defendants in violation of §3 of the Clayton Act refused to purchase potatoes unless the growers agreed to purchase seed and or fertilizer from the defendants or unreasonably discriminated against growers who did not make such purchases; Paragraph 13(e), that the defendants allegedly fixed non-competitive, arbitrary and artificially high prices on processed frozen potatoes; and Paragraph 13(f), that the defendants allegedly entered into or expanded their potato growing activities by securing acreage or additional acreage and placing said acreage under cultivation in order to (i) put independent potato growers out of business, or (ii) enable defendants to purchase growers' land or potatoes at depressed prices. Said motion was granted on the stipulation of the plaintiffs that no pecuniary damage was being or would be sought under said charges, and on the Court's order that that ruling would not affect the admissibility of evidence at trial.

Extensive discovery and pre-trial proceedings took place in this case for more than four years prior to the trial. Many hearings were held before the Court on motions to dismiss, motions to compel or control discovery and on numerous motions for partial or plenary summary judgments made by the various parties. In the course of those proceedings and in connection with pre-trial hearings preliminary to the trial itself, this case was extensively briefed as to both fact and law by the respective parties and two pre-trial hearings were held and pre-trial orders were made. Accordingly, by the time of trial much of the evidence adduced at the trial and the theories

of the respective parties, had been brought to the Court's attention.

Prior to the commencement of trial each of the parties waived trial by jury. The case went to trial between the plaintiffs, defendants and the class members on the issues framed by the Second Amended Complaint dated October 9, 1969 [other than the said provisions of ¶13(c), (e) and (f)], the answers of the defendants thereto, and on the issues presented by the Amended Counterclaim of Ore-Ida dated October 22, 1969 and the Amended Counterclaim of Simplot filed on or about October 22, 1969. The applicable damage period was the calendar years 1963 to 1966, inclusive.

During the trial over 400 exhibits were admitted into evidence. Numerous witnesses testified on both sides, and the Court in rendering its decision herein has taken into account its judgment as to the credibility and reliability to be accorded the testimony of each of the various witnesses.

Following conclusion of the trial findings of fact and conclusions of law were proposed by the parties and the Court has taken into consideration the briefs of the parties, the pre-trial orders, the evidence introduced and the proposed findings and, being fully advised in the premises, the Court now makes the following:

FINDINGS OF FACT

Jurisdiction and Venue

1. This Court has jurisdiction over the issues framed by plaintiffs' Second Amended Complaint and the Amended Counterclaims of each defendant under §§4 and 16

of the Clayton Act (15 U.S.C. §§15, 26). Each party defendant and counterclaimant maintains an office, transacts business and is found within the District of Idaho.

Parties

2. This lawsuit was instituted by plaintiffs on their own behalf and as representatives of a class of certain potato growers, described in plaintiffs' Second Amended Complaint. Pursuant to Rule 23 of the Federal Rules of Civil Procedure the Court ordered that for purposes of both the complaint and the counterclaims of the defendants the class consisted of all persons, firms, partnerships and corporations in Malheur County, Oregon and the ten southwestern counties of Idaho, to-wit: Ada, Adams, Boise, Canyon, Elmore, Gem, Owyhee, Payette, Valley and Washington Counties, who, during any of the years 1963-1966, sold potatoes to defendants Ore-Ida or Simplot, or either of them, pursuant to pre-season contracts. The names of those who were ultimately determined to comprise the class under Rule 23 were listed in Paragraph III of this Court's Order of August 3, 1970. Prior to trial certain members of this class requested to be excluded from the class and the instant lawsuit and the Court so excluded them. Farm Development Corporation was and is found to be a member of the class both for purposes of the complaint and the counterclaims.

3. Treasure Valley Potato Bargaining Association was during the complaint period an unincorporated agricultural cooperative having its principal place of business within this district. Its members are located primarily in the geographic area consisting of the ten southwestern

counties of Idaho and its principal function was to bargain collectively for its members with respect to prices, terms and conditions of pre-season potato contracts. Throughout the relevant time period it bargained with defendants as to such contracts for Ore-Ida's Ontario, Oregon plant and Simplot's Caldwell, Idaho plant. It did not bargain as to or either approve or disapprove such contracts for Ore-Ida's Burley plant or Simplot's Heyburn plant. The membership agreements between Treasure Valley and its grower-members prohibited the latter from selling their potatoes under pre-season contracts unless such contracts had first been approved by Treasure Valley for the crop year in question, or the growers had been released by the association. At no time during the relevant period did Treasure Valley process, prepare for market, handle, market, buy or sell any potatoes.

4. Plaintiff Malheur was and is a corporation having its principal place of business in Malheur County, Oregon. Its members are located primarily in Malheur County, Oregon and its principal function during the relevant period was to bargain collectively for its members with respect to prices, terms and conditions of pre-season potato contracts. Throughout the relevant time period it bargained with defendants as to such contracts for Ore-Ida's Ontario, Oregon plant and Simplot's Caldwell, Idaho plant. It did not bargain for or either approve or disapprove such contracts for Ore-Ida's Burley plant or Simplot's Heyburn plant. The membership agreements between Malheur and its grower-members prohibited the latter from selling their potatoes under pre-season contracts unless such contracts had first been approved by

Malheur or the growers had been released by the association. At no time during the relevant period did Malheur process, prepare for market, handle, market, buy or sell any potatoes.

5. Ore-Ida is a corporation existing under and by virtue of the laws of the State of Delaware, with its principal office and place of business in Boise, Idaho. It owned and operated a potato processing plant in Ontario, Oregon which purchased raw potatoes from potato growers, including some of the plaintiffs and class members herein, and then processed the potatoes into frozen french fries and other products which it distributed for resale in various parts of the United States.

6. Simplot is a corporation organized and existing under and by virtue of the laws of the State of Nevada with its principal office and place of business in Boise, Idaho. Its Food Processing Division owns and operates a potato processing plant in Caldwell, Idaho which obtains raw potatoes from potato growers, including some of the plaintiffs and class members, for processing into frozen french fries and other products which are distributed for resale in various parts of the United States. Simplot owns and has operated tracts of land on which it has grown potatoes suitable for processing at its processing plants.

The Trade, Industry and Market

7. During the relevant period of time each of the parties, including the class members, were engaged in interstate commerce in the conduct of their respective businesses, to-wit: the production, sale and purchasing

of raw potatoes and as to the defendants, the production, distribution and sale of frozen potato products. As to raw potatoes both grown by plaintiffs and purchased and processed by each defendant, there was a continuous flow of such raw potatoes in interstate commerce.

8. At all relevant times potatoes were raised in substantial quantities throughout the United States. In the western part of the United States there was substantial potato production in the States of Idaho, Oregon, Washington and California. At all relevant times raw potatoes were sold to resellers and consumers throughout the United States and to potato processors in Idaho and Oregon, such as Ore-Ida and Simplot and their various competitors. Such sales outlets were available during the relevant time period to potato growers in Idaho and Oregon, including the plaintiffs and class members.

9. In Idaho and Oregon a significant portion of the potato crop was sold following harvest on the open or spot market, where the prices fluctuated substantially from day-to-day and month-to-month, due to conditions of supply and demand, weather any many other economic factors. In Idaho, Oregon and in other areas, and particularly in the areas relevant to this case, potatoes were sold and marketed under pre-season contracts.

10. This litigation concerns pre-season contracts negotiated between the plaintiff bargaining associations, Malheur and Treasure Valley, and Ore-Ida for its Ontario plant and Simplot for its Caldwell plant. A pre-season contract is an agreement between a grower and a processor generally entered into in the Spring of the year, but

in any event before July 1, under which the grower agrees to plant, raise and harvest potatoes from specified acreage for delivery at or after harvest to the purchaser with whom the contract is entered into. The acreage on which the potatoes are to be grown and type of potato is specified in the contract. The contracts contain quality and size incentive provisions and the price the grower is to be paid depends upon various factors, primarily the base price, but including quantity, quality, size and condition of the potatoes at the time of delivery. Such contracts sometimes provide for storage of harvested potatoes by the grower to be subsequently delivered to the buyer out of such storage with the price and terms determined according to provisions of the contract including charges for the time period during which such potatoes remain in the grower's storage. Potatoes, although perishable, can be stored until the late Spring of the year following harvest.

11. The pre-season contract has significant advantages for both the processor and the grower. The processor is thereby assured delivery of its requirements thereby contracted for on the negotiated terms without being subject to the risks of the open market price level at the time of delivery. For the grower, the pre-season contract minimizes business risks by providing an assured market for his potatoes at harvest on the negotiated terms as opposed to the uncertainty of open market prices which may prevail at the time of harvest and which prices are subject to fluctuation due to many factors. Pre-season contracts for delivery at harvest eliminate the possible need for the grower to store the crop to await a more favorable market price with the cost and hazards, such as shrinkage, spoil-

age and other loss, attendant on storage. Additionally, a pre-season contract may enable the grower to obtain a loan to finance his operations or to provide for expansion and it also provides the grower with assistance from the processor's field department on cultural practices, disease and pest control, and other aspects of the growing and harvesting of the crop.

12. The alleged illegal activities asserted in the complaint and counterclaims concern pre-season potato contracts between the parties in the area of Malheur County, Oregon and the ten southwestern counties of Idaho, to-wit: Ada, Adams, Boise, Canyon, Elmore, Gem, Owyhee, Payette, Valley and Washington Counties. Except for the city of Boise, the area is largely rural with small, sparsely populated towns. The economy is essentially devoted to agriculture and there is a free and open flow of information about anything concerning agriculture. In the area in question potatoes are a seasonal crop generally planted during the Spring and harvested in the Fall. Due to different topographical and climatic conditions in Malheur County, Oregon, some potato varieties are harvested there some weeks earlier than in Idaho and, as a consequence, frequently command higher prices from processors and other purchasers due to the demand for early potatoes.

13. At all times relevant the defendant Ore-Ida for its Ontario, Oregon plant and Simplot for its Caldwell, Idaho plant procured raw potatoes from growers in the relevant area through pre-season contracts; and in part through open market purchases. Each defendant also obtained raw potatoes by contract or open market purchases from growers or sellers in other parts of Idaho and from outside

the State of Idaho and Malheur County, Oregon. Each defendant contracted for the purchase of potatoes both from members of Treasure Valley and Malheur, and from growers who were not members of either association.

14. Throughout the relevant period directors, officers and members of Malheur and Treasure Valley met with each other to discuss prices and terms of sale each would seek during their separate pre-season contract negotiations with the respective processors. At these meetings there were free and open discussions about prices and terms of pre-season contracts and other aspects of negotiations with individual processors. By tacit agreement between the two associations, they sought to obtain similar terms and provisions in the pre-season contracts of the respective processor upon which they had tacitly agreed.

15. Generally, Malheur bargained first with Ore-Ida at Ontario and when agreement was reached between them as to the price and terms of that pre-season contract, Treasure Valley would adopt essentially the same form of contract for its members selling potatoes to Ore-Ida at Ontario. Similarly, contracts negotiated between Treasure Valley and Simplot at Caldwell were thereupon approved by Malheur for its members selling potatoes to Simplot at Caldwell. Normally, there were no negotiations, as such, between Malheur and Simplot or between Treasure Valley and Ore-Ida. Once the first pre-season contract of each year was finally agreed upon, whether between Malheur and Ore-Ida, or between Treasure Valley and Simplot, the other defendant routinely refused to agree to any substantially greater price or terms than that embodied in the contract first settled upon, likewise

the affected bargaining association refused to accept less advantageous price or terms.

16. The status of pre-season negotiations and the prices and terms which were offered and discussed by the respective parties to these negotiations were a matter of common knowledge in the agricultural communities involved here. These negotiations were widely publicized and reported in the local news media and the newspapers frequently carried reports of the prices and terms which had been offered and agreed upon during the course of negotiations. The growers themselves talked freely with each other and kept fieldmen and other employees of the respective defendants informed of the views within the respective associations as well as the status of negotiations with the respective processors. Accordingly, during the process of most negotiations by one of the bargaining associations with one of the processors, the status of those negotiations was public knowledge and was well-known in the community.

17. Members of each bargaining association, Malheur and Treasure Valley, contracted with the defendants, and in each year, one or more grower-members contracted to sell potatoes under pre-season contracts to both defendants. There was no allocation of growers among or by the defendants. Further, since some members of each association were contracting with both defendants, there was a desire by the members of the association to obtain pre-season contracts with substantially similar terms from both Simplot and Ore-Ida. The minutes of the meetings of the two associations show that their policy was to seek like and advantageous contracts and treatment from each processor.

18. In the years 1963 through 1966 there was a substantial increase in the raw potato production in the relevant geographic area involved in this lawsuit. In 1963 there were approximately 5,500 acres under potato production in that area. That production was increased 57% in 1964, 134% in 1965 over 1963, and 169% in 1966 over 1963. This resulted in a condition of oversupply especially in the years 1965 and 1966 with more potatoes available for sale to processors than could be used by them. This condition was caused in part by the fact that many growers substantially increased their potato growing acreage and others, including large corporate growers such as Farm Development Corporation, who had not previously grown potatoes, brought in large acreage of new potato growing land, and still other growers who had not theretofore grown potatoes elected to do so in 1966. Much of this increased acreage resulted when thousands of acres of desert land adjacent to the Snake River were reclaimed. This reclamation was made possible by the advent of new techniques for raising water from the river to irrigate heretofore barren land. Irrigation on such a large scale necessitated the investment of large amounts of capital and these new large farming operations, such as Farm Development Corporation, produced substantial quantities of potatoes within close proximity to the defendants' processing plants at Ontario, Oregon and Caldwell, Idaho.

19. The 1964 crop was adversely affected by a severe frost and poor weather conditions which resulted in a poor crop that year. The consequent short crop nationally produced a marked increase in open market prices for

that crop during the Spring of 1965; it also had the effect of increasing the pre-season contract prices for the 1965 crop to provide an offset for the resulting higher potato seed costs. The higher prices for the 1965 crop also brought more people into the potato growing business and lead others to increase their acreage, resulting in over-production in 1966.

20. During the relevant time period there was no potato production area in the country where higher prices were paid to growers for potatoes sold under pre-season contracts than were paid plaintiffs under pre-season contracts with Ore-Ida and Simplot, in Southwestern Idaho and Malheur County, Oregon. The closest major potato producing area is the Columbia basin of Washington where a number of large-volume potato processors, competitors of Ore-Ida and Simplot, were located. These Washington processors consistently under-priced their finished product in competition with Ore-Ida and Simplot. On the raw potato side, the growers in Southwestern Idaho and Malheur County received substantially higher prices for their potato crops than did growers in the State of Washington, to such an extent that there was concern among the officers of Treasure Valley and Malheur that Washington raw potato prices might lead to a deterioration of the raw prices in their own area.

The Offenses Charged Against The Defendants

21. The plaintiffs and class members charge the defendants Ore-Ida and Simplot with violations of §§1 and 2 of the Sherman Act (15 U.S.C. §§1, 2). In general they charge they were injured in their business or property

by reason of a claimed combination or conspiracy to restrain trade in, or to monopolize the trade and commerce in the production and distribution of, frozen potato products, by agreement, express or implied, to fix, depress or stabilize prices for raw potatoes procured under pre-season potato contracts, by agreements to avoid competing with each other on pre-season contract prices offered to growers in that area and by agreements to impair the efficacy of the Malheur or Treasure Valley bargaining associations. The defendants are also charged with having conspired to discriminate against plaintiffs Stiehl, Clements, Skyles and Skogsberg, officers of Treasure Valley, in relation to asserted refusals during 1966 to enter into pre-season contracts with them for acreages they desired. As to like charges for other plaintiffs, plaintiffs' attorney agreed that a motion for dismissal should be granted for lack of any supporting proof.

22. The Court was liberal in the reception of evidence addressed to all charges tried. It permitted evidence relating to the conduct of the defendants in all areas of their operations whether or not directly related to raw product procurement, including such areas as their marketing and sales activities with relation to finished product, as well as evidence of defendants' profits. It also received background evidence in the period prior to the relevant time period (1963-1966) as well as evidence with relation to subsequent years, down to the time of trial. This evidence was received and evaluated to determine whether it, combined with that more directly related to the subject matter and time period, would provide inferences to support the charges of the Second Amended Complaint.

23. On the basis of all the evidence and all the inferences that may reasonably be drawn therefrom, the Court finds that the plaintiffs have failed to carry their burden of proving the charges made; and finds that the defendants did not directly or indirectly, or expressly or impliedly, make or enter into any contract, agreement, combination or conspiracy in restraint of trade or to monopolize trade as charged. The Court further finds that no plaintiff and no class member has sustained any injury to his or its business or property by reason of any act of either defendant forbidden by any antitrust laws.

24. There was no proof that the defendants, or either of them, at any time during the years 1963 through 1966, or prior or subsequent thereto, knowingly entered into any express or implied agreement to restrain or monopolize trade either as charged or otherwise. There was no written or oral evidence to show by inference or otherwise that defendants or either of them had entered into any such agreement, combination, conspiracy or understanding. Officers and employees of the defendants in testimony given in open court, explicitly denied entering into any such agreement, understanding, combination or conspiracy. They also testified that the acts of each company in relation to the pre-season contracts during the relevant time period and geographic area were the results of decisions independently made by each company in the furtherance of its own business interests and were not the result of any understanding or agreement, express or implied, with the other defendant. The Court has considered all such testimony and finds it to be credible and reliable, and finds that the inferences to the contrary,

which the plaintiffs urge on the Court from circumstantial evidence, are not acceptable.

25. The plaintiffs produced evidence designed to prove circumstantially an illegal agreement, i.e., (1) similarity of pre-season contracts of defendants entered into during the pertinent years, (2) contacts that occurred between employees of each defendant, (3) by comparisons between certain events occurring during the relevant period with events in subsequent years. The Court finds from all the evidence in the case, both oral and written, including the foregoing circumstances, that the conclusions urged by the plaintiffs are not reasonable, that plaintiffs have failed to carry their burden of proof in regard thereto, and that the weight of the evidence does not support their contentions.

26. The pre-season contracts of each defendant in many respects did contain terms and provisions which were substantialy parallel. The base price (against which adjustments for quality, size and condition of crop are computed) was the same each year, but there were differences in the respective contract provisions that did affect the prices the growers in fact received. The Court finds that the defendants bargained with the growers independently of each other but that the two associations and their members, including the plaintiffs, maintained close relationships with each other and bargained collectively for their respective members with each of the defendant processors. Some members of each association sold potatoes to both defendants and it was the avowed goal of the two associations and their members to obtain similar contracts from both defendants, so that their

members would be treated similarly regardless of the processor to whom they sold their potatoes. To achieve this objective the two associations and their officers, directors, and bargaining committees, including some of the plaintiffs, met with each other frequently, exchanged information on the progress of each other's negotiations, sought to resolve differences between them, coordinated their bargaining efforts, attempted to take a united position in negotiations with the processors, made arrangements that one would not agree to a lower price without first consulting with the other, frequently acted together in approving the contracts of the processors, and sought to use the leverage of the combined positions of their members to negotiate for and obtain higher prices and better terms on the pre-season contracts with Ore-Ida and Simplot during the relevant years. The Court finds from these facts, and from all the evidence in the case, and from the inferences that reasonably flow therefrom, that the similarity in the pre-season contracts was essentially the result of the activity of the growers and their bargaining associations.

27. The contacts and communications between employees and officers of the defendants which are relied upon by the plaintiffs to show a violation of the antitrust laws do not support any inference of an agreement violative of the antitrust laws. They were for proper purposes, were not anticompetitive, and had neither the purposes nor the effect of an agreement, combination or understanding to fix or stabilize potato prices or to monopolize or attempt to monopolize trade or commerce in potatoes, or to violate any antitrust laws in any man-

ner. Some of these contacts or communications represented the normal social interchange of persons living and working in the same local community. Other such contacts or communications were for proper business purposes and did not in any way involve prices to be paid for potatoes. The Court finds that the defendants did not by virtue of any of the contacts or communications which did occur between them enter into any express or implied, direct or indirect, agreement, understanding, combination or conspiracy for the purpose or with the effect of fixing, stabilizing or affecting potato prices or monopolizing interstate trade or commerce in potatoes.

28. Information of the sort which plaintiffs contend was the subject matter of conspiratorial communications between defendants was in fact common knowledge in the relevant geographic area and was freely passed back and forth among the members of the community interested in the growing or sale of potatoes. Information about prices and terms of pre-season potato contracts and the status of negotiations between the grower bargaining associations and the processors spread rapidly throughout the relatively sparsely populated rural communities involved. The negotiations and the positions of the bargaining associations and the processors with respect thereto were of interest in these local communities and were general subjects of public discussion and common knowledge.

29. The Court finds from the oral testimony and documentary evidence in this case and the inferences to be reasonably drawn therefrom that none of the officers or employees of either defendant ever discussed or agreed

upon the price that either or both would pay for raw potatoes.

30. The Court further finds that the plaintiffs have not carried their burden of proving the charge that there was any conspiratorial agreement to impair the efficacy of the Malheur and/or Treasure Valley bargaining associations or to discriminate against plaintiffs Stiehl, Clements, Skyles or Skogsberg in relations to 1966 preseason contracts. These contentions are largely based upon the testimony of those plaintiffs; that testimony did not hold up under cross-examination and the Court finds it is not persuasive. The Court further finds that of the four plaintiffs, all except plaintiff Clements received contract acreage in 1966 from one or both of the defendants. Clements had refused to contract acreage with Simplot in 1965. When he applied for a contract in 1966 Simplot had already committed a substantial portion of its contract acreage to others and had more applications for acreage than it could contract. Simplot's policy was to first offer contracts to those growers who had contracted with Simplot in 1965 and Clements did not receive a contract for that reason. As to Ore-Ida, a bad feeling had developed between Clements and Ore-Ida's field department having no relation to the bargaining that had gone on, but arising out of disagreements on unrelated subjects.

31. The Court finds that in 1966 the bargaining associations did not approve the pre-season contracts of the defendants until the second week of March. By that time neither defendants had as much acreage available for contracting as many of the grower-members desired to

contract. This was because of the greater supply of potato acreage above referred to and because the defendants had already committed substantial portions of their contract acreage to non-member growers after negotiations with the bargaining associations had earlier become deadlocked. The Court finds it is not true that any diminution in acreage contracted by either processor with any plaintiff in 1966 was the result of any agreement, combination, conspiracy, direct or indirect, express or implied, between the defendants, nor was there any such agreement or understanding to allocate or divide growers or customers between themselves.

32. The Court finds from all the evidence, both oral and written, that no unlawful agreement may be inferred during the relevant period from comparisons between the pre-season contract prices and terms of the relevant period and those of the subsequent years.

33. With respect to the plaintiffs' charge that defendants combined and conspired to monopolize interstate trade and commerce in raw potatoes or in frozen potato products, or attempted to monopolize such trade or commerce, the Court further finds that each of the defendants acted independently of the other with respect to all aspects of their respective businesses, including the procurement of raw potatoes and the processing, distribution and marketing of the frozen finished product. Neither defendant possessed monopoly power in any relevant market or geographic area. The Court further finds that defendants did not by any agreement, understanding, combination, conspiracy, or otherwise, acquire or maintain power in any relevant market or geographic area to fix, stabilize or control raw potato or frozen potato

product prices or to remove, exclude or foreclose competitors from such competition; and further that defendants did not either individually or collectively have the intention, nor did either attempt, to achieve, exercise or maintain any such power.

34. The two bargaining associations, through the membership, including individual plaintiffs, acted in concert in bargaining with the defendants for pre-season raw potato contracts in the relevant area for the years 1963 through 1966 inclusive in the manner heretofore described. They actively worked together, exchanged information and held out together for a single basic price and similar contract terms relative to tare and incentive clauses. This activity was the controlling reason for the similarity of price and contract terms heretofore found to have existed during the relevant years.

35. Each association was a non-profit co-operative consisting for all practical purposes of farmers who were actual growers of potatoes or crop-sharing landlords of such growers. Non-production members had no influence on the policies or activities of either association. Evidence of the existence of such "non-producer" membership was minimal.

36. No activity of either association separately or together was predatory or undertaken for any purpose other than the legitimate promotion of growers' interests in accordance with Section 6 of the Clayton Act.

37. During the time period, Farm Development Corporation, a company engaged in the production of raw potatoes, made its own separate and specific determination as a business matter and in its business interest that since

it was trying to collect accounts from various plaintiff farmers it unilaterally decided not to contract its own potatoes until such time as the bargaining associations had arrived at an agreement with the defendants or had determined that they could not arrive at such an agreement with the defendants. Neither Farm Development Corporation nor Allen Noble nor "HPG" (nor any other person or corporation) combined or conspired with the bargaining associations in restraint of trade or to monopolize the sale of raw potatoes.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the subject matter of this action and the counterclaims, and over the parties hereto, pursuant to §§4 and 6 of the Clayton Act (15 U.S.C. §§15, 26).

2. This is a class action properly maintained under the provisions of Rule 23, Federal Rules of Civil Procedure. The persons described in paragraph 2 of these Findings are members of the class for purposes of both the complaint and the counterclaims asserted by the defendants, and are bound by the Judgment entered herein.

3. Ore-Ida and Simplot did not violate any of the antitrust laws as charged in the Second Amended Complaint or otherwise; specifically, they did not enter into any contract, combination, conspiracy, agreement or understanding in restraint of the trade or commerce among the several states either in the procurement of raw potatoes or in the sale of frozen potato products; nor did they individually or by agreement monopolize or attempt

to monopolize, nor did they combine or conspire with each other to monopoiize, any part of that trade or commerce, in violation of §1 or §2 of the Sherman Act (15 U.S.C. §§1, 2).

4. None of the plaintiffs and none of the class members was injured in his or its business or property by reasons of any act of either defendant forbidden by the antitrust laws within the meaning of §4 of the Clayton Act (15 U.S.C. §15).

5. The defendants are entitled to judgment that the plaintiffs and class members, and each of them, do have and recover nothing of or from the defendants or either of them on the allegations of the Second Amended Complaint and that the said claims of said plaintiffs and class members be and are dismissed, with prejudice.

6. That concerted bargaining activity of the associations is immunized from the antitrust laws by reason of Section 6 of the Clayton Act.

7. That the aforesaid immunity was not lost because of:

a. The co-operation between the associations.

b. The membership of either association.

c. Any conduct of the association.

d. Any activity with Farm Development Corporation, Allen Noble or "IPG", or anyone else.

8. That counterdefendants did not violate any of the antitrust laws.

9. That if it were found that the Court is in error in finding no violation of antitrust laws on the part of

the counterdefendants, the proffered evidence of the counterclaimants as to measure of damage was based on conjecture and speculation and insufficient to establish a reasonable basis for determining damages.

10. That counterclaimants take nothing by reason of their amended counterclaim and that the same be dismissed, with prejudice.

11. That each party bear its own costs.

LET JUDGMENT BE ENTERED ACCORDINGLY.

/s/ Ray McNichols
Ray McNichols
United States District Judge

In the United States District Court
for the District of Idaho

Civil No. 1-66-108

Treasure Valley Potato Bargaining Association; Robert S. Skyles, Allen Noble and Burke Neeley, dba White Sage Farms, a partnership; James Klahr; Klahr & Klahr, Inc., a corporation; M. O. Clements; M. L. Clements; Dry Lake Farms, Inc., a corporation; Richard Stiehl; Hans Gotsch; Henry Kondo and Oscar Kondo, dba Kondo Brothers, a partnership; Kondo Farms, Inc., a corporation; Kondo Brothers, Inc., a corporation; Glenn Allen and David Allen, dba Glenn & David Allen, a partnership; R. E. Morris; R. L. Stimpson, Elsen Yorgazon and Bob Hogg, dba Western Idaho Farms, a partnership; Dwayne Skogsberg, Glenn Skogsberg and Hazel Skogsberg, dba Ed Skogsberg & Sons, a partnership; Sky Ranch, Inc., a corporation; Orville Hartman; James Sutton; Hugh Sutton; Donald Brandt; John Brandt; H. E. Blatekamp; Broken Arrow Farms, Inc., a corporation; Malheur Potato Bargaining Association; George Sadamori, Roy Sadamori and Theodore Sadamori, dba Sadamori Brothers, a partnership; Masa Nishihara; Sam Uchida and Sho Uchida, dba Uchida Brothers, a partnership; Abe Saito, Paul Saito and Joe Saito, dba Saito Brothers, a partnership; Saito Brothers, Inc., a corporation; and T. Tod Morinaka,

Plaintiffs and Counterdefendants,

vs.

Ore-Ida Foods, Inc., and J. R. Simplot Company,

Defendants and Counterclaimants.

[June 15, 1971]

JUDGMENT

The above-entitled cause came on regularly for non-jury trial on March 9, 1971 in the above Court, before the Honorable Ray McNichols. The above-named plaintiffs and counter-defendants, on their own behalf and as

representative parties for all the class members, were represented throughout the proceedings in this case by Maxwell M. Blecher and Joseph M. Alioto of the law office of Joseph L. Alioto, and Howard D. Humphrey of the law firm of Cosho, Humphrey & Southcombe, with the exception that Farm Development Corporation, a class member, in its capacity as a counterdefendant only, was represented by Melvin R. Goldman of the firm of Morrison, Foerster, Holloway, Clinton & Clark and William F. Ringert of the firm of Anderson, Kaufman, Anderson & Ringert. Defendant and counterclaimant Ore-Ida Foods, Inc. was represented by William Simon and Donald J. Gavin of the firm of Howrey, Simon, Baker & Murchison and by Eugene C. Thomas and Ronald B. Rock of the firm of Moffatt, Thomas, Barrett & Blanton. Defendant and counterclaimant J. R. Simplot Company was represented by Carl J. Schuck and George Christensen of the firm of Overton, Lyman & Prince and by Jess B. Hawley, Jr. of the firm of Hawley, Troxell, Ennis & Hawley.

By order filed herein October 14, 1969, the Court granted defendants' joint motion for summary judgment, based on incapacity to sue, against plaintiffs Treasure Valley Potato Bargaining Association and Malheur Potato Bargaining Association and ordered that as to said plaintiffs the complaint was dismissed and that said plaintiffs may take nothing thereby.

By order filed August 3, 1970 the Court granted the defendants' motion for summary judgment as to the following charging paragraphs of the Second Amended Complaint: paragraph 13(c), alleging that the defendants in violation of §3 of the Clayton Act refused to purchase

potatoes unless the growers agreed to purchase seed and/or fertilizer from the defendants or unreasonably discriminated against growers who did not make such purchases; paragraph 13(e), that the defendants allegedly fixed noncompetitive, arbitrary and artificialy high prices on processed frozen potatoes; and paragraph 13(f), that the defendants allegedly entered into or expanded their potato growing activities by securing acreage or additional acreage and placing said acreage under cultivation in order to (i) put independent potato growers out of business, or (ii) enable defendants to purchase growers' land or potatoes at depressed prices. Said motion was granted on the stipulation of the plaintiffs that no pecuniary damage was being or would be sought under said charges, and on the Court's order that that ruling would not affect the admissibility of evidence at trial.

Prior to the commencement of trial all parties waived trial by jury. The case went to trial between the plaintiffs, defendants and the class members on the issues framed by the Second Amended Complaint, dated October 9, 1969 [other than the said provisions of ¶13(c), (e) and (f)], the answers of the defendants thereto, and on the issues presented by the Amended Counterclaim of Ore-Ida dated October 22, 1969 and the Amended Counterclaim of Simplot filed on or about October 22, 1969. The applicable damage period was the calendar years 1963 to 1966, inclusive.

During the trial, over 400 exhibits were admitted into evidence. Numerous witnesses testified on both sides, and the Court in rendering its decision herein has taken into account its judgment as to the credibility and reliability to be accorded the testimony of each of the various witnesses.

Following conclusion of the trial, findings of fact and conclusions of law were proposed by the parties, and the Court took into consideration the briefs of the parties, the pretrial orders and proceedings, the evidence introduced and the proposed findings, and the Court, having made its Findings of Fact and Conclusions of Law and being fully advised in the premises, and good cause appearing therefor:

It Is Hereby Ordered, Adjudged And Decreed, as follows:

1. This Court has jurisdiction of the subject matter of this action and the counterclaims, and over the parties hereto, pursuant to §§4 and 6 of the Clayton Act (15 U.S.C. §§15, 26).

2. The plaintiffs as to whom this judgment is entered are: Robert S. Skyles, Allen Noble and Burke Neeley, dba White Sage Farms, a partnership; James Klahr; Klahr & Klahr, Inc., a corporation; M. O. Clements; M. L. Clements; Dry Lake Farms, Inc., a corporation; Richard Stiehl; Hans Gotsch; Henry Kondo and Oscar Kondo, dba Kondo Brothers, a partnership; Kondo Farms, Inc., a corporation; Kondo Brothers, Inc., a corporation; Glenn Allen and David Allen, dba Glenn & David Allen, a partnership; R. E. Morris; R. L. Stimpson, Elsen Yorgazon and Bob Hogg, dba Western Idaho Farms, a partnership; Dwayne Skogsberg, Glenn Skogsberg and Hazel Skogsberg, dba Ed Skogsberg & Sons, a partnership; Sky Ranch, Inc., a corporation; Orville Hartman; James Sutton; Hugh Sutton; Donald Brandt; John Brandt; H. E. Blanksma; Broken Arrow Farms, Inc., a corporation; George Sadamori, Roy Sadamori and Theodore Sadamori, dba Sadamori

Brothers, a partnership; Masa Nishihara; Sam Uchida and Sho Uchida, dba Uchida Brothers, a partnership; Abe Saito, Paul Saito and Joe Saito, dba Saito Brothers, a partnership; Saito Brothers, Inc., a corporation; and T. Ted Morinaka.

3. The defendants are: Ore-Ida Foods, Inc. (Ore-Ida), a Delaware corporation; and J. R. Simplot Company (Simplot), a Nevada corporation.

4. The Second Amended Complaint was properly maintained as a class action under the provisions of Rule 23 of the Federal Rules of Civil Procedure. It was determined during pretrial proceedings, and it is now ordered, that the class alleged therein consisted of all persons, firms, partnerships and corporations in Malheur County, Oregon, and the ten southwestern counties of Idaho, to-wit: Ada, Adams, Boise, Canyon, Elmore, Gem, Owyhee, Payette, Valley and Washington Counties, who, during the years 1963-1966, sold potatoes to defendants Ore-Ida or Simplot, or either of them, pursuant to pre-season contracts. The names of those who were ultimately determined to comprise the class under Rule 23 were listed in paragraph III of this Court's Order of August 3, 1970. Prior to trial certain members of this class requested to be excluded from the class and the instant lawsuit and the Court so excluded them. Farm Development Corporation was and is a member of the class for purposes of this judgment.

5. Ore-Ida and Simplot did not violate any of the antitrust laws either as charged in the Second Amended Complaint or otherwise; specifically, they did not enter into any contract, combination, conspiracy, agreement or

understanding in restraint of trade or commerce among the several States in the procurement of raw potatoes, or in the sale of frozen potato products, nor did they monopolize, nor did they or either of them attempt to monopolize, or combine or conspire with each other to monopolize, any part of said trade or commerce in violation of either Section 1 or Section 2 of the Sherman Act (15 U.S.C. §§1, 2).

6. None of the plaintiffs and none of the class members was injured in his or its business or property by reason of any act of either defendant forbidden by the antitrust laws within the meaning of Section 4 of the Clayton Act (15 U.S.C. §15).

7. The plaintiffs and the class members, and each of them, shall have and recover nothing of or from the defendants or either of them.

8. That the actions of the plaintiffs were not in violation of the antitrust laws as changed in the Amended Counterclaim.

9. That defendants and counterclaimants were not injured in their property or businesses by any acts of plaintiffs and counterdefendants.

10. That defendants and counterclaimants and each of them shall have and recover nothing from the plaintiffs or counterdefendants, or any of them.

11. That no costs are allowed.

/s/ Ray McNichols

Ray McNichols
United States District Judge

Appendix B

Nos. 71-2742 to 71-2744
United States Court of Appeals,
Ninth Circuit.

Treasure Valley Potato Bargaining Association et al.,
Plaintiffs-Appellants,
v.
Ore-Ida Foods, Inc. and J. E. Simplot Company,
Defendants-Appellees.

Treasure Valley Potato Bargaining Association,
Plaintiff-Cross-Appellee,
v.
Ore-Ida Foods, Inc.,
Defendant-Cross-Appellant.

Treasure Valley Potato Bargaining Association,
Plaintiff-Cross-Appellee,
v.
J. R. Simplot Company,
Defendant-Cross-Appellant.

[April 11, 1974]

Before CARTER, GOODWIN and WALLACE, Circuit Judges.

JAMES M. CARTER, Circuit Judge:

This is a private action for treble damages under the antitrust laws. The plaintiffs grow potatoes and sell them to the defendants; the defendants turn these raw potatoes into frozen french fries and resell them. In 1966

the action was initiated by the plaintiffs, charging *inter alia* that the defendants had conspired from 1963 to 1966 to fix the prices at which they would purchase the plaintiffs' potatoes. The defendants charged by counterclaim that the plaintiffs themselves had combined in violation of the Sherman Act. The district court, after a trial without a jury decided that neither side had violated the law. We affirm.

The issues, broadly speaking, are four: (1) does the evidence compel a finding that the defendants (appellees) combined and conspired a violation of § 1 of the Sherman Act; (2) does the evidence compel a finding that the defendants monopolized or attempted to monopolize the relevant market in violation of § 2 of the Sherman Act; (3) in regard to the defendants' counterclaim, did the trial court err in concluding that § 6 of the Clayton Act exempted the plaintiffs (cross-appellees) from the antitrust laws; and (4) did the court err in refusing an injunction on the counterclaim on the ground that the defendants (cross-appellants) established no reasonable basis for determining damages.

Facts

The plaintiffs, individual potato growers in Idaho and Oregon, bring this action in their own behalf and as representatives of all other persons and businesses in Malheur County, Oregon, and in ten southwestern counties of Idaho, who sold potatoes to the defendants by preseason contract[1] during 1963 to 1966. Essentially this

[1] A preseason contract is an agreement made between a grower and a processor in the spring, when the potatoes are planted. The grower agrees to raise and harvest potatoes on specified land, and the processor agrees to buy the crop at a certain price (which is

class consists of members of the Treasure Valley Potato Bargaining Association and the Malheur Potato Bargaining Associations.[2]

These two associations, each composed of several hundred potato growers, are in the business of representing their individual members on a collective basis in negotiations with potato processors. An individual member is prohibited from selling his potatoes under a preseason contract unless the contract is approved by his association.

The defendants, Ore-Ida Foods, Inc., and J. R. Simplot Company, are potato processors. Ore-Ida has a processing plant in Ontario, Oregon, and Simplot has one in Caldwell, Idaho. Other potato processors in the area, competitors of Ore-Ida and Simplot, were not named as defendants.

During 1963 to 1966, Ore-Ida and Simplot purchased raw potatoes both by preseason contract and by purchase on the open market. They made these potato procurements from growers in Idaho and Oregon and also from growers in other states. Although they bought large

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modified by formula according to the size, quality, and condition of the raw potatoes at delivery). The grower is therefore assured in advance that he can sell his potatoes at a fairly predictable price, and the processor is assured he can fill his future requirements.

Thus preseason contracts eliminate some of the risks of the open market. On the open market, where raw potatoes are sold after the harvest, prices rise and fall from day to day, and the vagaries of weather, crop disease, and consumer appetite are constantly altering the best laid plans. Yet, with all the uncertainties attending the open market, a significant portion of each potato crop is sold only after the harvest, rather than in spring by preseason contract.

[2]Originally the two associations were plaintiffs in the action. The court dismissed as to them for lack of capacity to sue, since they did not sell potatoes. No appeal was taken from their dismissal. They remained as cross-defendants on the counterclaim.

amounts of potatoes from members of Treasure Valley and Malheur, they also purchased from growers who were not members.

This litigation arises from the activity leading up to the formation of preseason contracts between the defendants and the growers in the plaintiff class.

Officers and members of Treasure Valley and Malheur met with each other often during 1963 to 1966 to discuss the prices and the terms of sale that each association, during its separate negotiations with the potato processors, would seek to obtain for its members in preseason contracts. The two associations agreed to seek similar terms.

Generally, Malheur would be the first to bargain with Ore-Ida. After those two had reached an agreement, Treasure Valley would negotiate with Ore-Ida and seek to obtain the same terms for its members. In a similar fashion, Treasure Valley would be the first to bargain with Simplot, and Malheur would follow, seeking to obtain the same terms for its members selling to Simplot.

There was normally true bargaining over only the first preseason contract formed, whether it was between Malheur and Ore-Ida, or Treasure Valley and Simplot. Once the terms of that first contract were established, both processors would routinely refuse to give better terms in subsequent contracts that year, and both associations would usually refuse to accept worse terms.

The negotiations over preseason contracts were widely publicized in the agricultural community of Idaho and Oregon. Newspapers and radio frequently reported the

prices and other terms being offered. The growers talked freely with each other about the status of the negotiations, and exchanged information with employees of the processors. Without doubt, the parties were "bargaining in sunshine."

The plaintiffs contended the defendants bargained illegally. In particular, the plaintiffs alleged (1) that Simplot and Ore-Ida agreed with each other to fix the prices they would offer the plaintiffs; (2) that Simplot and Ore-Ida occasionally boycotted the potatoes grown by the officers of the bargaining associations when the officers proved hardnosed at the bargaining table; and (3) that Simplot and Ore-Ida allocated growers between them.

Such alleged conduct, contended the plaintiffs, involved a combination unreasonably in restraint of trade, thus violating § 1 of the Sherman Act, and constitutes a monopolization or attempted monopolization of the relevant market, thus violating § 2 of the Act.[3]

Simplot and Ore-Ida, not content with merely defending against the plaintiffs' remaining claims, asserted in

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[3]Before trial, the district judge granted summary judgment for the defendants on three of plaintiffs' claims: (1) that Simplot and Ore-Ida discriminated against growers who refused to purchase seed or fertilizer from them; (2) that Simplot and Ore-Ida fixed artificially high prices at which they would sell their frozen french fries in the aftermarket; and (3) that Simplot and Ore-Ida acquired land, and grew potatoes on it, for the purpose of driving independent growers out of business. The defendants' motion for summary judgment was granted on the plaintiffs' stipulation that no pecuniary damages were being sought on those claims. Plaintiffs do not assign error to the summary judgment.

At trial, plaintiffs dropped the boycott charges as to the officers of Malheur Ass'n and as to 11 of the 15 officers of Treasure Valley Ass'n.

a counterclaim that the bargaining association had combined and conspired in restraint of trade.

After a trial without a jury, in which the court liberally received abundant quantities of documentary and oral evidence, the court made its findings of fact and conclusions of law. In brief, the court held that Simplot and Ore-Ida did not directly or indirectly, expressly or impliedly, enter into any agreement in restraint of trade, and they did not monopolize or attempt to monopolize trade. Concerning the counterclaim, the court held that the bargaining activity of the associations and their members was immunized by reason of § 6 of the Clayton Act; and that, in any event, the proffered evidence of Ore-Ida and Simplot as to measure of damages was based on speculation and conjecture and was insufficient to establish a reasonable basis for determining damages.

On appeal, we consider the four broad issues listed above, namely: whether the evidence compels a finding that the defendants violated § 1 or § 2 of the Sherman Act; whether § 6 of the Clayton Act and/or § 1 of the Capper-Volstead Act immunizes the plaintiffs on the counterclaim, and whether Simplot or Ore-Ida is entitled to an injunction when no damages or threat of damages was proved.

I

Defendants' Alleged Violation of § 1 of the Sherman Act

[1] The basic factual issue under this claim is why the preseason contracts negotiated by the bargaining associations with Simplot, on the one hand, and Ore-Ida, on

the other, contain similar price terms. The plaintiffs contend that Simplot and Ore-Ida conspired to maintain similar terms. The court, however, found that the similarities in preseason contracts stemmed from the concerted bargaining activity of the two associations and from natural market forces. Since our review of the record does not disclose clear error, we necessarily affirm this finding. Rule 52, F.R.Civ.P.

The plaintiffs adduce a variety of circumstantial evidence tending to prove the alleged conspiracy. Foremost is the similarity in contracts. In addition, the plaintiffs present documentary evidence—memoranda, journal entries, meeting minutes, and so forth—which show that the defendants communicated with each other, and which tend to show that they discussed prices on preseason contracts.

[2] Because the trial court declined to infer from this circumstantial evidence that a conspiracy existed, the plaintiffs contend that the judge was laboring under the mistaken notion that a conspiracy must be proved by direct rather than circumstantial evidence. It is well-established, of course, that circumstantial evidence may suffice. Interstate Circuit, Inc. v. United States, 306 U.S. 208, 59 S.Ct. 467, 83 L.Ed. 610 (1939). It is equally well-established, however, that circumstantial evidence does not compel an inference of conspiracy. In the *Interstate Circuit* case the Court acknowledged that powerful circumstantial evidence of conspiracy could be rebutted by direct testimony of the alleged conspirators.

It appears to us that the trial judge correctly understood the teachings of *Interstate Circuit*, for he stated

that his findings were drawn "from *all* the evidence in the case, and from the *inferences* that reasonably flow therefrom." [emphasis added].

Rebutting the circumstantial evidence of conspiracy, there was plentiful oral testimony by officers of Simplot and Ore-Ida categorically denying any sort of illicit combination or agreement in regard to preseason contracts. The trial judge found the oral rebuttal persuasive, and we, giving due regard to his opportunity to judge of the credibility of the witnesses, find no clear error.

There is other evidence tending to rebut the circumstantial evidence of a conspiracy by the defendants. For example, when the former president of Treasure Valley was asked "You [i. e. Treasure Valley and Malheur] were trying to achieve similar terms or identical terms from Simplot and Ore-Ida at that time; is that correct?" he responded, "I think that's right, yes." Thus, in addition to the defendants' denial of conspiracy, the plaintiffs' admission that the bargaining associations actively strived to obtain similar contracts supports the finding that the activity of the bargaining associations, not of Simplot and Ore-Ida, was the controlling reason for the similarity of price and contract terms.

Beyond merely asserting that the trial judge improperly disregarded circumstantial evidence, the plaintiffs maintain that he should have applied a *per se* rule but did not. They argue that United States v. Container Corp. of America, 393 U.S. 333, 89 S.Ct. 510, 21 L.Ed.2d 526 (1969), held that an exchange of price information by competitors that leads to price stabilization is, *per se*, a Sherman Act violation.

[3] Flaws fill this argument. First, it is far from clear that *Container Corp.* itself applied a *per se* rule rather than the rule of reason. Moreover, that case involved more than a mere exchange of price information; it involved an *agreement* to exchange price information whenever requested. In our case the court found that the defendants never even discussed prices at all. Whether or not that particular finding is erroneous,[4] it logically implies another finding which is *not* clearly erroneous—namely, that there was no agreement to exchange information on request. Absent such an agreement, *Container Corp.* does not control.[5] And had there been such an agreement, even then we would not apply *Container Corp.*, for in our case the trial court properly found that the activity of the bargaining associations was the controlling reason for the similarity of prices and contract terms. Any agreement between Simplot and Ore-Ida to exchange price data would therefore have had no substantial causal effect on preseason contracts.

[4] Just as we find no clear error in the determination that Simplot and Ore-Ida did not conspire to fix preseason contracts, we find no clear error in two other pertinent determinations: first, that there was no agreement to allocate growers; and, second, that there was no agreement to boycott or otherwise retaliate against the officers of the bargaining associations.

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[4]The plaintiffs contend that this finding is clearly erroneous, and we, too, believe that it may be wrong, for the record presents fairly clear evidence that some price discussions in fact occurred. Nevertheless, it is not necessary to determine whether or not the finding was correct, for even if it was wrong, the error did not control the outcome of the case.

[5]Gray v. Shell Oil Company (9 Cir. 1972) 469 F.2d 742, 746; cert. denied, 412 U.S. 943, 93 S.Ct. 2773, 37 L.Ed.2d 403 (1973).

II

Defendants' Alleged Violation of §2 of the Sherman Act

The trial court ruled that Simplot and Ore-Ida did not monopolize "any relevant market." While our review of this determination would be aided if the relevant market or markets had been precisely defined in the record, the record as it stands will suffice to support the trial court.

"The offense of monopoly under §2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." United States v. Grinnell Corp., 384 U.S. 563, 570-571, 86 S.Ct. 1698, 1704, 16 L.Ed.2d 778 (1965). The plaintiffs have established neither of these elements.

[5] In regard to monopoly power, we need not define the relevant market exactly, for whatever the confines may be, it appears from the record that the defendants possessed no monopoly power *vis à vis* the potato growers. Monopoly power is "the power to control prices or exclude competition." United States v. du Pont & Co., 351 U.S. 377, 391, 76 S.Ct. 994, 1005, 100 L.Ed. 1264 (1956). The trial court found, and we believe this finding supportable, that the activity of the bargaining associations, not of the defendants, was the controlling reason for the similarity of prices for raw potatoes. (Perhaps an indication of the bargaining leverage possessed by the plaintiffs is the fact that no potato growers in the country received higher prices for their raw product.) Nor did

the defendants exclude competition, for there were other potato *processors to whom the plaintiffs could sell*, and there were also 20 fresh-potato packers as possible buyers. The plaintiffs in fact made sales to these other buyers, and made sales on the open market as well as by preseason contract. Thus, given the bargaining power of Treasure Valley and Malheur, and the availability of substitute outlets for selling raw potatoes, it can reasonably be held that Simplot and Ore-Ida lacked power sufficient to satisfy the first element required by *Grinnell*.

Moreover, taking the second element, the record fails to prove that the defendants indulged in "the willful acquisition or maintenance of that power" they possessed.

[6] The trial court likewise held that the defendants engaged in no *attempt* to monopolize. This offense, unlike actual monopolization, does not require the possession of monopoly power, but it *does* require the "specific intent" to acquire it. Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 73 S.Ct. 872, 97 L.Ed. 1277 (1953). The evidence fails to reveal specific intent.

III

The Counterclaim: Clayton and Capper-Volstead Immunity

As to the counterclaim against the bargaining association, the court (1) found that the activity of the bargaining associations was the controlling reason for the similarity of prices of potatoes sold to Ore-Ida and Simplot; (2) held that the two associations were immune from antitrust liability by virtue of Section 6 of the Clayton Act, 15 U.S.C. § 17; and (3) found that the evidence was

insufficient to establish a reasonable basis for determining damages. We hold that the district court did not err in these determinations or in refusing to award damages or grant an injunction against the bargaining associations.

Ore-Ida and Simplot (cross-appellants) state that "they do not question this factual ruling on damages." But, although they do not seek damages, they do seek an injunction against the two associations, and contend that the associations, by acting together on prices, have no immunity under Section 6 of the Clayton Act, 15 U.S.C. § 17.

There is little law on the question of the extent of the Section 6 immunity. United States v. Borden, 308 U.S. 188, 204-205, 60 S.Ct. 182, 84 L.Ed. 181 (1939), stands for the proposition that an agricultural cooperative loses its exemptions under the Capper-Volstead Act, 7 U.S.C. §§ 291, 292, if it enters into agreements with "other persons" who in that case were *non*-producers of milk.

In United States v. Maryland Cooperative Milk Producers (D.C.D.C.1956), 145 F.Supp. 151, Judge Holtzoff ruled in a criminal case that price fixing between two separate agricultural cooperatives was immunized by Section 6 of the Clayton Act and acquitted the defendants. The fact that the government had no right to appeal from the acquittal detracts from the weight to be attached to the decision.

Two years later came the case of United States v. Maryland and Virginia Producers Ass'n (D.C.D.C.1958), 167 F.Supp. 45, rev'd, 362 U.S. 458, 80 S.Ct. 847, 4 L.Ed. 2d 880 (1960), a civil antitrust action. Judge Holtzoff

repeated his statement that an agricultural cooperative is exempt from the antitrust laws in its activities, provided it does not conspire with other persons who are *not* producers of agricultural products. But in this case the cooperative had purchased all the assets of a competitor, the Embassy Dairy, which was not an agricultural producer.

The complaint charged that the milk producers association (1) had attempted to monopolize and had monopolized interstate trade and commerce in fluid milk in Maryland, Virginia and the District of Columbia in violation of Section 2 of the Sherman Act; (2) had combined and conspired with Embassy Dairy and others, through contracts and agreements, to eliminate and foreclose competition in the same market in violation of Section 3 of the Act; and (3) had bought all the assets of Embassy Dairy, the largest competitor, the effect of which might have been substantially to lessen competition or to tend to create a monopoly in violation of Section 7 of the Clayton Act.

The district court dismissed the Sherman Act, Section 2, monopolization charge. It upheld the right of the government to go to trial on the Sherman Act, Section 3, and Clayton Act, Section 7, charges. After trial on these charges the district court found for the United States and entered a decree ordering the association to divest itself of all assets acquired from Embassy Dairy.

The case reached the Supreme Court in Maryland and Virginia Milk Producers' Ass'n, Inc. v. United States, 362 U.S. 458, 80 S.Ct. 847, 4 L.Ed.2d 880 (1960). The Court affirmed the portion of the judgment concerning

Section 3 of the Sherman Act and Section 7 of the Clayton Act, relying on United States v. Borden, 308 U.S. 188, 206, 60 S.Ct. 182, 84 L.Ed. 181 (1939). The acquisition of the Embassy Dairy thus caused the association to lose any immunity it might have under Section 6 of the Clayton Act, 15 U.S.C. § 17, or Section 1 of the Capper-Volstead Act, 7 U.S.C. § 291.

[7] As to monopolization charge under the Sherman Act, Section 2, the Supreme Court reversed the dismissal entered by the district court.[6] The Court stated [p. 468, 80 S.Ct. p. 854]:

> *Sherman Act § 2 Dismissal.*—The complaint charging monopolization alleged that the Association had "[t]hreatened and undertaken diverse actions to induce or compel dealers to purchase milk from the defendant [Association], and induced and assisted others to acquire dealer outlets" which were not purchasing milk from the Association. It also alleged that the Association "[e]xcluded, eliminated and attempted to eliminate others, including producers and producers' agricultural cooperative associations not affiliated with defendant, from supplying milk to dealers." Supporting this charge the statement of particulars listed a number of instances in which the Association attempted to interfere with truck shipments of nonmembers' milk, and an attempt during 1939–1942 to induce a Washington dairy to switch its non-Association producers to the Baltimore market. The statement of particulars also included charges

[6] The dismissal by the district court may have been based on the fact that the Embassy Dairy acquisition had apparently not been charged as a part of the monopolization violation. See 362 U.S. 466, 80 S.Ct. 847, and the case below, United States v. Maryland and Virginia Milk Producers Ass'n, Inc. (D.C.D.C. 1958), 167 F.Supp. 45, 47.

that the Association engaged in a boycott of a feed and farm supply store to compel its owner, who also owned an Alexandria dairy, to purchase milk from the Association, and that it compelled a dairy to buy its milk by using the leverage of that dairy's indebtedness to the Association. We are satisfied that the allegations of the complaint and the statement of particulars, only a part of which we have set out, charge anticompetitive activities which are so far outside the "legitimate objects" of a cooperative that, if proved, they would constitute clear violations of § 2 of the Sherman Act by this Association, a fact, indeed, which the Association does not really dispute if it is subject to liability under this section. It was error for the District Court to dismiss the § 2 charge. (Footnotes omitted)[7]

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[7] Elsewhere the Court stated:

This Court has held that the provisions of that section [Clayton Act § 6] relating to labor unions do not manifest "a congressional purpose wholly to exempt" them from the anti-trust laws and neither the language nor the legislative history of the section indicates a congressional purpose to grant any broader immunity to agricultural cooperatives. . . . Thus the full effect of § 6 is that a group of farmers acting together as a single entity in an association cannot be restrained "from lawfully carrying out *the legitimate objects* thereof" (emphasis supplied), but the section cannot support the contention that it gives such an entity full freedom to engage in predatory trade practices at will. See United States v. King, [1 Cir.] 229 F. 275, D.C., 250 F. 908, 910. Cf. United States v. Borden Co., 308 U.S. 188, 203-205 [60 S.Ct. 182, 190-191, 84 L.Ed. 181].

The Capper-Volstead Act of 1922 extended § 6 of the Clayton Act exemption to capital stock agricultural cooperatives which had not previously been covered by that section. Section 1 of the Capper-Volstead Act also provided that among "the legitimate objects" of farmer organizations were "collectively processing, preparing for market, handling, and marketing" products through common marketing agencies and the making of "necessary contracts and agreements to effect such purposes." We believe it reasonably clear from the very language of the Capper-Volstead Act, that the general philosophy of both was simply that individual farmers should be given,

The acts listed were clearly "predatory" and outside the legitimate objects of the cooperative, *id.*, p. 468, 80 S.Ct. 847, in obtaining a fair price for its member milk producers. They are a far cry from the acts of the two potato associations in our case to obtain the same price for members of both associations, as found by the district court.

In 1962 the Supreme Court decided Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 370 U.S. 19, 82 S.Ct. 1130, 8 L.Ed.2d 305. We note the following as to cooperatives there involved:

(1) *Sunkist Growers, Inc.* 12,000 growers were organized into *local* associations; the associations in turn were organized into district exchanges; and the representatives of the exchanges made up the governing board of *Sunkist.* [p. 22, 82 S.Ct. 1130]

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through agricultural cooperatives acting as entities, the same unified competitive advantage—and responsibility—available to businessmen acting through corporations as entities. As the House Report on the Capper-Volstead Act said:

"Instead of granting a class privilege, it aims to equalize existing privileges by changing the law applicable to the ordinary business corporations so the farmers can take advantage of it."

This indicates a purpose to make it possible for farmer-producers to organize together, set association policy, fix prices at which their cooperative will sell their produce, and otherwise carry on like a business corporation without thereby violating the antitrust laws. It does not suggest a congressional desire to vest cooperatives with unrestricted power to restrain trade or to achieve monopoly by preying on independent producers, processors or dealers intent on carrying on their own businesses in their own legitimate way. . . . Although contrary inferences could be drawn from some parts of the legislative history, we are satisfied . . . that the Act did not leave cooperatives free to engage in practices against other persons in order to monopolize trade or restrain and suppress competition with the cooperative. (pp. 464-467, 80 S.Ct. p. 852) [Emphasis added]

(2) *Exchange Orange* was a separate legal entity composed of orange grower associations. In 1931 it was purchased by *Sunkist* and thereafter operated as a wholly-owned subsidiary of *Sunkist*. [p. 20, 82 S.Ct. 1130]

(3) *Exchange Lemon* was a separate legal entity composed of lemon grower associations, which were also members of *Sunkist*. [p. 21, 82 S.Ct. 1130]

(4) The fruit, both oranges and lemons, was marketed and *priced* by *Sunkist*. [p. 22, 82 S.Ct. 1130]

The defendants, *Sunkist* and *Exchange Orange* (*Exchange Lemon* was not a defendant), were not held by the district court to be in violation of the antitrust laws. Certiorari was granted on the petition of *Sunkist* and *Exchange Orange* and the judgment below was reversed because the instructions, according to the Supreme Court, "left it open for the jury to base their verdict upon a finding of conspiracy between petitioners [*Sunkist* and *Exchange Orange*] and *Exchange Lemon*. The Court stated: [pp. 27-29, 82 S.Ct. pp. 1135-1136]:

> We are squarely presented, then, with the question of whether Sunkist, Exchange Orange, and Exchange Lemon—the three legal entities formed by these 12,000 growers—can be considered independent parties for the purpose of the conspiracy provisions of §§ 1 and 2 of the Sherman Act. We conclude not. Section 6 of the Clayton Act provides, *inter alia*, that agricultural organizations instituted for the purposes of mutual help shall not be held or construed to be illegal combinations or conspiracies in restraint of trade under the antitrust laws. The Capper-Volstead Act sets out this immunity in greater specificity:
>
> "That persons engaged in the production of agricultural products as farmers, planters, ranchmen,

dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes . . . ."

There can be no doubt that under these statutes the 12,000 California-Arizona citrus growers ultimately involved could join together into *one* organization for the collective processing and marketing of their fruit and fruit products without the business decisions of their officers being held combinations or conspiracies. The language of the Capper-Volstead Act is specific in permitting concerted efforts by farmers in the processing, preparing for market, and marketing of their products. . . .

Instead of a single cooperative, these growers through local associations first formed one area-wide organization (Sunkist) for marketing purposes. . . . With due respect to the contrary opinions of the Court of Appeals and District Court, we feel that the 12,000 growers here involved are in practical effect and in the contemplation of the statutes one "organization" or "association" even though they have formally organized themselves into three separate legal entities. To hold otherwise would be to impose grave legal consequences upon organizational distinctions that are of *de minimis* meaning and effect to these growers who have banded together for processing and marketing purposes within the purview of the Clayton and Capper-Volstead Acts. [Foonotes omitted]

Only one reference was made to the *Maryland case* (362 U.S. 458, 80 S.Ct. 847, 4 L.Ed.2d 880). It appears in the concluding paragraph of the opinion.

> Suffice it to say that our decision in no way detracts from earlier cases holding agricultural cooperatives liable for conspiracies with outside groups, United States v. Borden Co., 308 U.S. 188 [60 S.Ct. 182, 84 L.Ed. 181] (1939), and for, monopolization, Maryland & Virginia Milk Producers Ass'n. v. United States, 362 U.S. 458 [80 S.Ct. 847, 4 L.Ed.2d 880] (1960). [p. 30, 82 S.Ct. p. 1136]

We infer that the Supreme Court in *Sunkist* found the defendants had not engaged in "predatory practices" or "monopolization" as those terms were used in the *Maryland* opinion, and thus the price practices of *Sunkist*, *Exchange Orange* and *Exchange Lemon* were not within the scope of *Maryland's* holding. See United Egg Producers v. Bauer International Corp. (S.D.N.Y.1970), 312 F.Supp. 319, where the court, relying on *Sunkist*, *supra*, held that cooperatives are "immune from the proscriptions of Section 1 of the Sherman Act. . . ."

In our case we consider both Section 6 of the Clayton Act, 15 U.S.C. § 17, and Section 1 of the Capper-Volstead Act of 1922, 42 Stat. 388, 7 U.S.C. § 291.

Section 1 of the Capper-Volstead Act provides:

> "Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such

> associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes . . . ."

All authorities agree that one impact of the Capper-Volstead Act was to permit agricultural cooperatives exempt under the Clayton Act to issue capital stock. The Supreme Court in Case-Swayne Company, Inc. v. Sunkist Growers, Inc., 389 U.S. 384, 88 S.Ct. 528, 19 L.Ed.2d 621 (1967) states (at 391, 88 S.Ct. 528) that the Capper-Volstead Act was enacted to clarify the exemption for agricultural cooperatives and to extend it to cooperatives having capital stock. *Accord,* Maryland and Virginia Milk Producers Association, Inc. v. United States, 362 U.S. 458, 468, 80 S.Ct. 847, 4 L.Ed.2d 880 (1960); United States v. Maryland & Virginia Milk Producers Ass'n (D.C.D.C.1958), 167 F.Supp. 45, 50; modified on other grounds, 362 U.S. 458, 80 S.Ct. 847, 4 L.Ed.2d 880 (1960).

An additional contribution of the Capper-Volstead Act is the express language: "Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes." There is no way to read the section but to accept the express language that two or more associations may "have marketing agencies in common." The only uncertainty is what activities such marketing agencies may practice.

The particular provision has been interpreted expressly in only one case, United States v. Maryland Cooperative Milk Producers, Inc. (D.C.D.C.1956), 145 F.Supp. 151, 155. That case accepts the express language of the section

as we do. The court stated: "It will be noted that the Act permits agricultural cooperatives to have marketing agencies in common. Obviously, it must have been contemplated that a common marketing agency would fix the same prices for the products of all its principals and would not discriminate among them." (p. 154)

In Farmers' Live Stock Commission Co. v. United States (E.D.Ill.1931), 54 F.2d 375, 377, the court in discussing a common agent employed by eight associations, said: "Such an agency, owned by co-operative associations in common, is authorized by the Capper-Volstead Act . . . ." See also "A Prediction: The Exemption Favoring Agricultural Cooperatives Will Be Reaffirmed" by Seth M. Hufstedler, Vol. 22, Administrative Law Review (1969-1970), 455, 463.

[8] If Section 1 of the Capper-Volstead Act, 7 U.S.C. § 291, permits a common marketing agency, separate from the cooperatives themselves, it would follow that *without* such a separate agency, the associations may act together in marketing and make the necessary contracts to accomplish their legitimate purpose. If an act of the agent is lawful, the same act performed by the principal is also lawful.

The Cooperative Marketing Act of 1926, 44 Stat. 803, 7 U.S.C. § 455,[8] lends support to this interpretation. Section 455 provides:

"Dissemination of crop, market, etc., information by cooperative marketing associations

[8]The only references we can find to this section in case law are United States v. Maryland Cooperative Milk Producers, Inc., *supra* (145 F.Supp. 151, 155) and United States v. Borden Co. (D.C. Ill.1939), 28 F.Supp. 177, 184.

> Persons engaged, as original producers of agricultural products, such as farmers, planters, ranchmen, dairymen, nut or fruit growers, acting together in associations, corporate or otherwise, in collectively processing, preparing for market, handling and marketing in interstate and/or foreign commerce such products of persons so engaged, may acquire, exchange, interpret, and disseminate past, present, and prospective crop, market, statistical, economic, and other similar information *by direct exchange between such persons, and/or such associations or federations thereof, and/or by and through a common agent* created or selected by them." (July 2, 1926, c. 725, § 5, 44 Stat. 803.) [Emphasis added]

The defendants (cross-appellants) assert, however, that the Capper-Volstead Act is inapplicable to the potato growers associationss in this case. The defendants here make the flat statement: "Since neither Malheur Ass'n nor Treasure Valley Ass'n engage in the sale of potatoes, they do not qualify as an exempt organization because they engage in none of the functions enumerated in the statute." This statement begs the question—must associations engage in the sale of potatoes in order to be considered as engaged in "marketing"?

The two associations were in fact "bargaining" associations. They were named "Malheur Potato *Bargaining* Association" and "Treasure Valley Potato *Bargaining* Association." (Emphasis added). Their principal function was to bargain collectively for their respective members as to prices, terms and conditions of preseason potato contracts. They "coordinated their bargaining

efforts" and tacitly attempted to secure similar contracts from both associations so that their members would be treated similarly regardless of the defendant-processor to whom they sold their potatoes.[9]

True, the associations did not collectively *process, prepare for market, handle* or actually sell potatoes. But Section 1 of the Capper-Volstead Act further authorizes "Persons engaged in the production of agricultural products as farmers . . . [to] act together in associations . . . in collectively . . . *marketing* in interstate and foreign commerce, such products of persons so engaged . . . may have marketing agencies in common; . . . ." (Emphasis added)

[9] The activities of the two associations came within the word *marketing*. Each association acted and bargained

[9]The court found, "By tacit agreement between the two Associations, they sought to obtain similar terms and provisions in the pre-season contracts of the respective processor upon which they had tacitly agreed." Malheur bargained first with Ore-Ida and when agreement was reached between them as to price and terms, Treasure Valley would adopt essentially the same form of contract of its members selling potatoes to Ore-Ida. Similarly, contracts negotiated between Treasure Valley and Simplot were thereupon approved by Malheur for its members selling potatoes to Simplot. Normally there were no negotiations, as such, between Malheur and Simplot or between Treasure Valley and Ore-Ida. Since some members of each association sold potatoes to both Ore-Ida and Simplot, it was the avowed goal of the two associations and their members to obtain similar contracts from both defendants, so that their members would be treated similarly regardless of the processor to whom they sold their potatoes.

The court further found that the two associations, their officers, directors and bargaining committees met frequently, exchanged information on the progress of each other's negotiations and "co-ordinated their bargaining efforts."

The court further found:

> "No activity of either association, separately or together, was predatory or undertaken for any purpose other than the legitimate promotion of grower interests in accordance with Sec. 6 of the Clayton Act."

for its members in negotiating contracts for the sale of potatoes by its members. It was such bargaining activity, and particularly the practice of one association following the lead of the other, and attempting to secure for its members the same price obtained by the other association in its first contract with Ore-Ida and Simplot, that was the basis for defendants' (cross-appellants') contention of antitrust violations.[8]

[10] We think the term *marketing* is far broader than the word *sell*. A common definition of "marketing" is this: "The aggregate of functions involved in transferring title and in moving goods from producer to consumer, including *among others* buying, selling, storing, transporting, standardizing, financing, risk-bearing, and *supplying market information*." Webster's New Collegiate Dictionary, 1953 Edition. [Emphasis added]. The associations here were engaged in bargaining for the sales to be made by their individual members. This necessarily requires supplying market information and performing other acts that are part of the aggregate of functions involved in the transferring of title to the potatoes. The associations were thus clearly performing "marketing" functions within the plain meaning of the term. We see no reason to give that word a special meaning within the context of the Capper-Volstead Act.

L. Gene Lemon, Assistant General Counsel for the American Farm Bureau Federation in "The Capper-Volstead Act—Will it Ever Grow Up", Vol. 22, Admin.Law Review, pp. 433, 447, et seq., distinguishes between "Handling cooperatives" and "Bargaining Cooperatives." There is no indication that he does not consider

them as exempt under the Clayton and Capper-Volstead Acts, or that "bargaining" is not an exempt activity for an agricultural cooperative. He concludes "that bargaining cooperatives are much in need of somewhat more liberal court constructions of the Capper-Volstead Act, perhaps more so than are handling cooperatives." (p. 450-451.)[10]

[11] Without doubt, an agricultural cooperative is not wholly exempt under Sec. 6 of the Clayton Act or Section 1 of the Capper-Volstead Act from the scope of the antitrust laws. A cooperative can lose its exemption if it monopolizes, or attempts to monopolize or engages in "predatory practices." Maryland and Virginia Milk Producers Ass'n, Inc. v. United States, *supra* [362 U.S. 458, 80 S.Ct. 847, 4 L.Ed.2d 880]. It can lose its exemption by entering into agreements or conspiring as to prices with "other persons" who are non-producers. United States v. Borden, supra.[11]

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[10]The best discussion we have been able to find on the Clayton and the Capper-Volstead Acts was a panel discussion of the Administrative Law Section of the American Bar Association at the 1960 annual meeting of the Section in Dallas, Texas. It was sponsored by the Agricultural Committee of the Section under the chairmanship of Stuart H. Russell. Three presentations were made:

(1) "Cooperative Exemptions under the Antitrust Laws: A prosecutor's View" by Charles D. Mahaffie, Chief, General Litigation Section, Antitrust Division, Dept. of Justice;

(2) "The Capper-Volstead Act—Will it Ever Grow Up" by L. Gene Lemon, member of the Illinois Bar, Assistant General Counsel of the American Farm Bureau Federation, and

(3) "A Prediction: The Exemption Favoring Agricultural Cooperatives Will Be Reaffirmed" by Seth M. Hufstedler, member of the California Bar and then President of the Los Angeles County Bar Association.

[11]A portion of the remarks of Seth M. Hufstedler at the Administrative Law Section of the American Bar Association in Dallas (footnote 9) are here set forth:

Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., *supra*, reversed a judgment because the Court's instructions left it open for the jury to base its verdict on a finding of conspiracy between Sunkist and Exchange Orange (the petitioners) and Exchange Lemon, a separate legal entity. True, the Court stated that in effect they were one organization and thus exempt. But the Court also stated (370 U.S. p. 29, 82 S.Ct. p. 1136), "To hold otherwise would be to impose grave legal con-

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We can summarize then the things the Courts have said that a Capper-Volstead cooperative can do.

1. Producers may organize together in a single entity.
2. The entity may set Association policy.
3. The entity may fix prices.
4. The entity may obtain a complete monopoly, 100% of the product involved.
5. The Association may handle all of the production of its members.
6. It may process all of the products of its members.
7. It may prepare the products for market.
8. It may market the products.
9. The producers and the Associations may have marketing agencies in common.
10. The producers and the Associations may make the necessary contracts to carry out the legitimate objects of the producers and their Associations.

The Supreme Court has also laid down guide lines on what such an Association cannot do. *Maryland and Virginia* pointed out that the Association could not engage in "predatory trade practices." In *Winckler*, it was made clear that the Association cannot engage in "competition stifling practices," and the Association may not engage in "monopolization." In *Maryland and Virginia*, the Court said that the cooperatives could not "restrain trade", or "achieve monopoly by preying on independent producers, processors or dealers intent on carrying on their own businesses in their own legitimate way."

Various courts have determined that certain conduct constitutes "predatory trade practices."

In *Maryland and Virginia*, the following conduct was involved.

1. The cooperative interfered with shipments of non-members milk.
2. It induced one dairy to switch its marketing outlets from the area of direct competition with the cooperative.

sequences upon organizational distinctions that are of *de minimis* meaning and effect to these growers who have banded together for processing and marketing purposes. . . ."

5. Its members boycotted a business to compel it to deal with the cooperative.

4. The cooperative used its economic power through loans to compel dealings with the cooperative.

5. The cooperative bought out its competitor at an exorbitant price to eliminate competition.

In Borgjans [Borgjans Farm Dairy Co. v. Sanitary Milk Producers (E.D.Mo.1965), 241 F.Supp. 456], the following conduct was discussed:

1. Attempts by the cooperative to compel customers to deal on an exclusive basis with the cooperative.

2. Illegal rebates were given.

3. The cooperative engaged in "manipulation to control the market."

4. The cooperative conspired with retail outlets to fix resale prices.

5. The Court found that there was an express intent to use unlawful means to control the market.

On top of all this, said the Court, the officers of the cooperative lied in their testimony. One does not have much difficulty characterizing such conduct as "predatory trade practices."

In the *North Texas* case, the following conduct was involved:

1. The cooperative compelled customers to deal exclusively with it.

2. There were apparently tying conditions involving the use of trucking.

3. The cooperative instituted a boycott to accomplish its aims. (North Texas Producers Ass'n v. Metzger Dairies, Inc., 348 F.2d 189 (5th Cir. 1965).)

In the *Borden* case, of course, the conduct complained of was the conspiracy with noncompetitive persons to fix prices. (United States v. Borden Co., 308 U.S. 188, 60 S.Ct. 182, 84 L.Ed. 181 (1939).)

In the *Otto Milk* case, the conduct complained of was compelling shop keepers not to buy from others through a coercive and boycott. (Otto Milk Co. v. United Dairy Farmers Coop. Ass'n, 388 F.2d 789 (3rd Cir. 1967).)

An examination of this kind of conduct which has thus been condemned shows that it would be difficult, under any circumstances to justify the activities which the Court found took place. However crudely "predatory trade practices" may be defined, this conduct clearly constitutes such illegal practices. [Vol. 22, Admin.Law Review (1969-70) 455 at 461-463.]

In our case, to the extent that the grower associations have banded together for marketing purposes, their organizational distinctions are *de minimis*.

[12] Moreover, there was no finding of monopolization or attempt to monopolize by the associations; nor of any "predatory practices" such as existed in the *Maryland* case. Neither Ore-Ida nor Simplot so contend on this appeal. Nor did either plaintiff association in its activities compete with or injure other sellers of potatoes. The activities of the associations were directed toward securing a fair price for their grower members and their only alleged "sin" was agreeing that the price obtained by one association would be the price carried over into the other association's contract.

We hold that the trial court did not err in refusing to hold them in violation of the antitrust laws.

IV

The Counterclaim: Absence of Injury

In any event, the district court held that "the proffered evidence of [Ore-Ida and Simplot] as to measure of damages was based on conjecture and speculation and insufficient to establish a reasonable basis for determining damages." Ore-Ida and Simplot do not challenge this factual finding, nor do we see any error. Therefore, even absent the Clayton Act immunity, Ore-Ida and Simplot were not entitled to damages. Furthermore, they were not entitled to an injunction under traditional principles of equity.

Section 16 of the Clayton Act, 15 U.S.C. § 26, provides as follows: "Any person, firm, corporation, or association

shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings . . . ."

[13] A traditional principle of equity is that no injunction will issue unless the allegedly unlawful conduct is likely to cause irreparable harm. Nowhere has the district court found a threat of irreparable injury. On the other hand, there is no explicit finding that no such threat exists. But we are not troubled by the lack of an explicit finding on this point, for we believe that the above-quoted language of the district court fairly implies, in the context of the entire record, a finding that no threat of irreparable injury existed.

The court's language, of course, refers only to the measure of damages alleged to have occurred in the *past*. It does not state that no injury was likely to occur in the future.

Although the explicit meaning of this statement is limited, a great deal more is implicit in the words "conjecture and speculation." These words, when read in the context of the entire lengthy findings of fact and conclusions of law, and all the evidence on record, suggest to us that the district court believed not only the *measure* of past damages to be speculative and conjectural, but the very *existence* of past injury to be equally uncertain. And the record as a whole suggests further that the court

believed that the existence of a threatened future injury was likewise dubious.

[14] It is true, of course, that injury sometimes occurs whose measure is uncertain, and a *threat of injury* may be quite real even though the *measure* of the threatened injury defies calculation. And if the threat is real, an injunction may issue even though the injury, if it were to occur, could be measured only by speculation and conjecture. Indeed, one reason for issuing an injunction may be that damages, being immeasurable, will not provide a remedy at law.

[15] But such is not our case. Here, we feel, the district court implied that the very existence of a threat was based on conjecture and speculation, and our review of the record uncovers no evidence sufficient to support a finding that a threat did exist. Under these circumstances no injunction can issue.

The judgments in the main action and on the counterclaim are affirmed.

Appendix C

United States Court of Appeals
for the Ninth Circuit

Treasure Valley Potato Bargaining Association, et al., Plaintiffs-Appellants, vs. Ore-Ida Foods, Inc. and J. R. Simplot Company, Defendants-Appellees.	No. 71-2742
Treasure Valley Potato Bargaining Association, Plaintiff-Cross-Appellee, vs. Ore-Ida Foods, Inc., Defendant-Cross-Appellant.	No. 71-2743
Treasure Valley Potato Bargaining Association, Plaintiff-Cross-Appellee, vs. J. R. Simplot Company, Defendant-Cross-Appellant.	No. 71-2744 ORDER

[Filed June 24, 1974]

The panel to which the case was assigned [Carter, Goodwin and Wallace] having voted to deny the petition for rehearing and to reject the suggestion for hearing in banc; and all the judges in active service having been supplied with copy of the suggestion for hearing in banc, and no judge having voted to hear the case in banc,

IT IS ORDERED that the petition for rehearing is denied and the suggestion for hearing in banc is rejected.